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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 11, 1989.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the Customs Bulletin," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89–71)

Abstracts of Unpublished Customs Service Decisions

COMMODITY CLASSIFICATION

C.S.D. 89–71(1)—*Commodity:* Blouse with fabric tie. The item is a women's 100 percent rayon long sleeve blouse with a placket covering the buttons and features a separate 100 percent rayon tie to wear around the neck. There are no loops or other attachments for the fabric tie. *Classification:* The blouse and fabric tie are classified as composite goods under subheading 6206.40.3030, HTSUSA, which provides for women's or girls' blouses, shirts and shirtblouses, of man-made fibers, other, other, textile category 641. *Document:* Hqs. ruling letter 084063, dated April 25, 1989.

C.S.D. 89–71(2)—*Commodity:* Blouse and tie. A women's blouse, accompanied by a tie, both manufactured from a 100 percent woven cotton fabric. The blouse is plain white, except for navy blue buttons and an outer portion of the collar which is navy blue. The tie is solid navy blue. The blouse features a full front opening secured by 10 buttons, long sleeves with double button cuffs, a double collar formed from a single piece, and a straight bottom. The tie measures approximately 2 inches wide and 58 inches long

and features pointed ends. It is designed to be worn around the blouse neckline. *Classification:* The blouse and accompanying tie are classifiable in subheading 6206.30.3040, HTSUSA, textile category 341, which provides for women's blouses: of cotton: other * * * *Document:* Hqs ruling letter 081835, dated April 26, 1989.

C.S.D. 89–71(3)—*Commodity:* Blouse and tie. A women's blouse, accompanied by a tie, both manufactured from a 100 percent woven polyester fabric. The blouse has a white background with various shapes scattered across it in the following colors: yellow, purple, green, red, and blue. The tie is solid white. The blouse features a full front opening secured by seven concealed buttons, long sleeves with single button cuffs, a pointed collar, a collar band, and a straight bottom. The tie measures approximately 5½ inches wide and 68 inches long and features pointed ends. It is designed to be worn around the blouse neckline. *Classification:* The blouse and accompanying tie are classifiable in subheading 6206.40.3030, HTSUSA, textile category 641, which provides for women's blouses: of man-made fibers: other * * * *Document:* Hqs. ruling letter 083319, dated April 26, 1989.

C.S.D. 89–71(4)—*Commodity:* Boot linings and sole lining. Unassembled boot linings and sole lining produced in Canada, consisting of the liner (two pieces and the sole lining, one piece) will be shipped together. The pieces will be stitched together in the U.S. When the three pieces are joined together, in conjunction with a small additional piece, they will constitute either a boot lining (if sewn into the boot shell) or a removable boot liner (if only inserted into the boot shell). *Classification:* The merchandise is classifiable under subheading 6406.10.8040, HTSUSA, as parts of footwear, uppers and parts thereof, other than stiffeners, other * * * of textile materials other than cotton, of man-made fibers. *Document:* Hqs. ruling letter 083796, dated April 26, 1989.

C.S.D. 89–71(5)—*Commodity:* Briquets used for outdoor cooking. *Classification:* The briquets used for outdoor cooking fuel are classifiable under the tariff provision for wood charcoal, heading 4402.00.00, HTSUSA. *Document:* Hqs. ruling 083315, dated April 24, 1989.

C.S.D. 89–71(6)—*Commodity:* Comforter. The pillow-foot-pocket-comforter is a multipurpose product. When folded into the built-in pocket, the product measures 18½ by 23½ inches and has the appearance of a larger decorative throw pillow. Unfolded, it becomes a comforter with a pocket at one end into which one's feet may be inserted. Unfolded, the article measures 33⅝ inches by 63⅝ inches exclusive of a 3⅜ inch ruffle. The shell and liner of the article are made from woven fabric consisting of 65 percent polyester and 35 percent cotton. The filling consists of 100 percent polyester fiber fill. The inside cording is 100 percent poly-

ester. *Classification:* The pillow-foot-pocket-comforter is classified as an article of bedding or a similar furnishing, stuffed, whether or not covered, other * * *, subheading 9404.90.9040, HTSUSA. *Document:* Hqs. ruling letter 083049, dated April 28, 1989.

C.S.D. 89–71(7)—*Commodity:* Fibrous ion exchange resin. The fibers are formed by extrusion and are composed of 33.3 percent polyethylene and 66.6 percent cross-linked polystyrene sulfonic acid. Technical specifications from the manufacturer state that the cut fiber is between 0.2 mm and 1 mm in length; the information in the patent is that they may be from 0.1 mm to 200 mm. The fibers in the sample are at the low end of this range. *Classification:* When imported in lengths over 5 mm, the fibers are classified under subheading 5503. 90.0000, HTSUSA, a provision for other synthetic staple fibers, not carded, combed, or otherwise processed for spinning. When imported in lengths not over 5 mm, it is classified under subheading 5601.30.0000, HTSUSA, a provision including textile flock. *Document:* Hqs. ruling letter 083646, dated April 28, 1989.

C.S.D. 89–71(8)—*Commodity:* Fireplace screen. The article is a fan-shaped fireplace screen. It is made of solid polished brass. It is 27 inches high and 37½ inches wide. It is to be placed on the ground in front of a fireplace to provide a non-flammable barrier to block embers which may shoot out of the fire. It is intended to be ornamental as well as functional. *Classification:* The fireplace screen is classifiable under subheading 9403.80.60, HTSUSA, as furniture of other materials, other. *Document:* Hqs. ruling letter 083639, dated April 24, 1989.

C.S.D. 89–71(9)—*Commodity:* Hammock. A hammock chair made of 100 percent nylon yarn. The yarn is made into a raschel knit construction fabric to form the netting of the hammock. The netting is formed in the shape of the chair and the hardware is added after importation into the United States. *Classification:* The hammock is classifiable under subheading 6307.90.9000, HTSUSA, as other made up articles, other, other. *Document:* Hqs. ruling letter 083671, dated April 24, 1989.

C.S.D. 89–71(10)—*Commodity:* Handbag. Braided evening bags. Two samples submitted. Sample 1805 is a handbag composed of 100 percent rayon satin with a braided shoulder strap and braided overlay trim. The braided overlay trim measures approximately ¾ of an inch to 1⅝ inches from the top zipper closure. Sample 3804 is composed of 100 percent rayon ribbed satin and has a braided shoulder strap. This bag can be used as a clutch or with the braided strap. *Classification:* The samples at issue are classified under subheading 4202.22.8050, HTSUSA, which provides for handbags, whether or not with shoulder strap, including those without handle, with outer surface of textile materials, of

man-made fibers, textile category 670. *Document:* Hqs. ruling letter 083632, dated April 27, 1989.

C.S.D. 89–71(11)—*Commodity:* Handbag. The article is an evening bag made of a man-made fiber textile material. Beads, bugles, and spangles are sewn in a design onto the textile outer surface of one side of the handbag. The handbag has a nylon lining. Between the outer textile material and the lining is a foam material. The bag has a nylon zipper. Narrow pieces of cardboard are sewn on the upper edge of the bag, along the zipper. The bag also has a braided shoulder strap made of man-made fibers. *Classification:* The handbag is classifiable under subheading 4202.22.80, HTSUSA, which provides for handbags, whether or not with shoulder strap, including those without handle, with outer surface of textile materials: other * * * *Document:* Hqs. ruling letter 081483, dated April 27, 1989.

C.S.D. 89–71(12)—*Commodity:* Leg warmers. Knit leg warmers, wholly of man-made fibers. *Classification:* The leg warmers of man-made fibers are classifiable under the provision for gaiters, leggings, and similar articles, and under the statistical annotation for leg warmers, in subheading 6406.99.1520, HTSUSA. *Document:* Hqs. ruling letter 084039, dated April 26, 1989.

C.S.D. 89–71(13)—*Commodity:* Neck pouch. The pouch is made of woven textile material and measures 4⅞ inches by 4 inches. It has two zippered compartments and is designed to be worn around the neck by means of a braided 19 inch textile cord. This pouch is meant to be worn on the person while skiing, bicycling, etc., and is intended to contain the same items as an ordinary wallet. *Classification:* The neck pouch is classifiable under subheading 4202.32.9550, HTSUSA, as wallets, of textile materials, articles of a kind normally carried in the pocket or in the handbag, with outer surface of textile materials, other, other, of man-made fibers. *Document:* Hqs. ruling letter 083992, dated April 24, 1989.

C.S.D. 89–71(14)—*Commodity:* Pencil case. The article is a molded plastic pencil case which measures approximately 8½ inches by 2 inches. The top of the case is detachable and the bottom of the case has a divider at one end which is approximately 2 inches from the end. The top of the pencil holder has an inscription. *Classification:* The pencil case is classified under subheading 4203.32.2000, HTSUSA, which provides for map cases, cigarette cases, powder cases, bottle cases, and similar containers, of plastic sheeting, or wholly or mainly covered with such materials, articles of a kind normally carried in the pocket or in the handbag, with outer surface of plastic sheeting, other. *Document:* Hqs. ruling letter 082828, dated April 27, 1989.

C.S.D. 89–71(15)—*Commodity:* Printing papers. Offset printing papers, freesheet (i.e., containing no mechanical woodpulp). The papers are sold to sheet-fed offset printers who print and cut or fold the paper into a finished product. The papers are made to specifications that include size and weight. *Classification:* The printing papers are classified in subheading 4802.52.90, HTSUSA. *Document:* Hqs. ruling letter 083365, dated April 24, 1989.

C.S.D. 89–71(16)—*Commodity:* Quilts. The quilts are made in the Philippines of 100 percent cotton U.S. fabric and 100 percent polyester. The sample quilt is about 52 inches square and has a 4 inch wide sleeve on the back along one edge. The face displays colorful designs formed by piecing; the back is a solid fabric. A folded bias edging of approximately 8 mm, measured to the fold, finishes all four sides. *Classification:* If the cotton predominates by weight, the quilts are classified under subheading 9404.90.9010, HTSUSA, textile category 362. If the man-made fiber predominates, they are classified under subheading 9404.90.9020, HTSUSA, textile category 666. *Document:* Hqs. ruling letter 084034, dated April 24, 1989.

C.S.D. 89–71(17)—*Commodity:* Shorts and suspenders. Women's shorts made of 100 percent acid wash blue denim with detachable suspenders. The shorts are designed with two waistbands. The waistband used for the suspenders is elasticized while the other waistband has loops. The shorts have side pockets and two pleats on each leg. *Classification:* The shorts and suspenders are classified as a set under subheading 6204.62.4055, HTSUSA, which provides for women's or girls' shorts, of cotton, textile category 348. *Document:* Hqs. ruling letter 083950, dated April 24, 1989.

C.S.D. 89–71(18)—*Commodity:* Telephone message forms. Spiral-bound paper telephone message forms that measure approximately 5½ inches by 8½ inches and 11 inches by 8½ inches. *Classification:* The spiral-bound telephone message forms are classified in items 4820.10.20 and 9903.42.40, HTSUSA. *Document:* Hqs. ruling letter 083676, dated April 25, 1989.

C.S.D. 89–71(19)—*Commodity:* Travel bag with accessories. A lady's travel bag measuring approximately 7 inches by 10.25 inches by 2.25 inches. It contains within one compartment an eye glass case, a coin purse and a change purse all secured by a full top width textile coil zipper closure. *Classification:* The travel bag with its accessories is classifiable, when composed of 100 percent cotton, under subheading 4202.92.1500, HTSUSA, as travel, sports and similar bags, with outer surface of textile materials, of vegetable fibers and not of pile or tufted construction, of cotton. *Document:* Hqs. ruling letter 081265, dated April 24, 1989.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 88–1221, 88–1222)

UNITED STATES, PLAINTIFF/APPELLANT *v.* TOSHOKU AMERICA, INC. AND FEDERAL INSURANCE CO., DEFENDANTS/CROSS-APPELLANTS, TOSHOKU AMERICA, INC., THIRD-PARTY/PLAINTIFF *v.* CATZ INTERNATIONAL, INC., THIRD-PARTY/DEFENDANT AND FOURTH-PARTY/PLAINTIFF *v.* SOUTHERN COMMODITIES, INC., FOURTH-PARTY/DEFENDANT

Kenneth N. Wolf, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for plaintiff/appellant. With him on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Peter J. Fitch, Fitch, King & Caffentzis, of New York, New York, argued for defendants/cross-appellants.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

(Decided June 30, 1989)

Before NEWMAN, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and ARCHER, *Circuit Judge.*

ARCHER, *Circuit Judge.*

The United States (government or Customs), Toshoku America Inc. (Toshoku) and Federal Insurance Company (FIC) appeal from the decision of the United States Court of International Trade, 670 F. Supp. 1006 (CIT 1987), granting summary judgment in favor of the government, but limiting its damages, and denying summary judgment in favor of Toshoku and FIC. We reserve.[1]

BACKGROUND

In October of 1978, Toshoku imported 1300 cartons of tuna into the United States for general consumption. The tuna was conditionally released to Toshoku pending an admissibility determination by the Food and Drug Administration (FDA). The conditional entry was covered by a General Term Bond for Entry Of Merchandise,

[1]The present dispute involves only Toshoku's liability in damages and nothing here said would authorize entry of adulterated tuna.

Customs Form 7595, executed by Toshoku as principal and FIC as surety. Upon finding that a sample of the tuna appeared to be decomposed, the FDA issued a Notice of Detention and Hearing and later, on December 12, 1978, a Notice of Refusal of Admission. The December notice was signed on behalf of the District Director of Customs and directed Toshoku to export the tuna within ninety days of the date of the Notice or risk its destruction.[2] Notwithstanding the inadmissibility of the tuna, Customs liquidated its entry on December 29, 1978. The goods were not reliquidated.[3]

On March 16, 1979, Customs notified Toshoku that unless it provided evidence that the tuna had been exported or destroyed it would be liable for liquidation damages under the redelivery provision, i.e., paragraph 4, of the entry bonds.[4] When Toshoku did not respond, Customs issued a Notice of Penalty or Liquidated Damages Incurred And Demand For Payment, Customs Form 5955–A, to Toshoku on May 7, 1979. This notice demanded that Toshoku pay to Customs $32,474.16 in liquidated damages for its failure to return the tuna to Customs' custody.[5]

Toshoku notified Customs that the Demand for Payment was premature because the required Notice to Redeliver had not been issued. *See* 19 C.F.R. § 141.131(g) (1978).[6] Thereafter on March 19, 1981, Customs cancelled its original damage claim[7] but asserted a new and separate damage claim for the same amount. The basis of the new claim was that Toshoku had failed to export the tuna as directed in the December 12, 1978 notice and "as required under section 7 of your entry bond."[8] The new claim was accompanied by another Customs Form 5955–A demanding payment, and a copy was

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[2]The Notice of Refusal of Admission, Food and Drug Administration Form 772 (8/75), states:

> You are hereby notified that admission of the above-described merchandise is refused. This merchandise must be exported under Customs' supervision within 90 days from the date of this notice or within such additional time as the District Director of Customs specifies. Failure to do so may result in destruction of the merchandise as authorized by the statute.

[3]The parties have not argued that the finality of liquidation, *see United States* v. *Utex Int'l, Inc.*, 857 F.2d 1408 (Fed. Cir. 1988), is applicable in this case. Here the Notice of Refusal of Admission was issued prior to the erroneous liquidation of the entry by Customs. *See Utex* at 1409 (obligations vested prior to liquidation are not comparable to post-liquidation obligations (distinguishing *United States* v. *American Motorists Ins. Co.*, 10 CIT 19 (1986))).

[4]Paragraph 4 of Customs Bond Form 7595 reads:

> (4) And if the above-bounden principal shall redeliver or cause to be redelivered to the order of the district director of customs, on demand by him, in accordance with the law and regulations in effect on the date of the release of said articles, any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States; or in default of redelivery after a proper demand on him, shall pay to said district director such amounts as liquidated damages as may be demanded by him in accordance with the law and regulations, not exceeding the amount of this obligation, for any breach or breaches thereof[.]

[5]This amount equals the value of the entered tuna ($30,636.00) plus the amount of estimated duties ($1,838.16) as determined at the time of entry. *See* 19 C.F.R. § 141.113(g) (1978) (regarding the amount of damages due the government when an importer fails to comply with Customs' demand to redeliver goods not entitled to admission into the United States).

[6]Unless otherwise noted, all regulatory citations are to the 1978 Code of Federal Regulations, which was in effect at the time the tuna was imported.

[7]As the government admitted at oral argument, its failure to demand redelivery of the tuna precludes the right to collect liquidated damages under paragraph 4 of the entry bond.

[8]Paragraph 7 of Customs Bond Form 7595 reads:

> (7) And if the above-bounden principal after proper notice shall mark, label, clean, fumigate, destroy, export, and do any and all other things that lawfully may be required in the case of any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, or, in default thereof, shall pay to the district director of customs as liquidated damages an amount equal to the value of the merchandise with respect to which there has been a default as set forth in the entry, plus the estimated duties thereon, as determined at the time of entry[.]

forwarded to FIC. After both Toshoku and FIC failed to pay, the government filed suit in the Court of International Trade under 28 U.S.C. § 1582(2) (1982) for recovery on the bond.

In the proceeding before the trial court, the parties each moved for summary judgment. The government argued that Toshoku had breached paragraph 7 of its entry bond by failing to export the adulterated tuna as directed in the December 12, 1978 notice. While conceding that the tuna was neither exported nor destroyed, Toshoku and FIC argued that paragraph 4 of the entry bond had not been complied with because Customs never demanded redelivery and thus cannot enforce a claim for failure to export under that paragraph. They also contended that paragraph 7 of the entry bond was inapplicable unless Toshoku sought and failed to bring the shipment into compliance, a scenario the government admitted did not occur. Lastly, Toshoku and FIC argued that in any event proper notice, as contemplated by paragraph 7 of the bond, was not provided.

The Court of International Trade granted summary judgment in favor of the government, but limited the awarded damages to the value of the merchandise, $30,636.00, because the "entry has been liquidated and the duty has been tendered." Both sides appeal.[9]

Discussion

A. Summary judgment is appropriate when there is no genuine issue regarding any material fact and when the movant is entitled to judgment as a matter of law. Rule 56(d) of the Rules of the United States Court of International Trade; *Hi-Life Prods., Inc.* v. *American Nat'l Water-Mattress Corp.*, 842 F.2d 323, 325 (Fed. Cir. 1988); *SRI Int'l* v. *Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). Neither side to this dispute suggests that any material fact remains in issue. Each side, however, argues that it is entitled to judgment as a matter of law. As the issue before us in one of law, we are free to decide the issue *de novo*.

B. As a preliminary matter, we reject the government's contention that Toshoku and FIC have waived their right to challenge the legality of Customs' demand for liquidated damages. According to the government, an assessment of liquidated damages against an importer and its surety is a "charge or exaction" within the meaning of 19 U.S.C. § 1514 (1982) and therefore, unless timely protested, is final and conclusive on the parties. Under the government's approach, Toshoku and FIC could have challenged the legality of the assessment only by filing a protest under 19 U.S.C. § 1514 followed by a suit under 28 U.S.C. § 1581(a) (1982) if their protest was denied.

[9]Because we conclude that the Court of International Trade erred in granting summary judgment to the government and not to Toshoku and FIC, we need not reach the government's appeal concerning the quantum of liquidated damages.

We do not agree. In *United States* v. *Utex Int'l, Inc.*, 857 F.2d 1408, 1413–14 (Fed. Cir. 1988), this court recently held, *inter alia*, that an assessment of liquidated damages is not "charge or exaction" that must be challenged by protest under 19 U.S.C. § 1514 (1982). Proof that the importer has complied with the conditions of the bond has traditionally been and still remains a complete defense to a collection suit brought on the bond. *See id.*; 1 P. Feller, *U.S. Customs and International Trade Guide,* § 13.06, 13–31 (1988).

C. Before turning to the merits of the defenses raised by Toshoku and FIC, we need generally to survey the statutory and regulatory framework under which foodstuffs are imported into the United States. The basic statutory provision governing the importation of foodstuffs is 21 U.S.C. § 381 (1982).[10]

The statutory scheme is enforced by the joint cooperation of the Secretary of the Treasury, through the Customs Service, and the Secretary of Health and Human Services, through the FDA. *See* 19 C.F.R. § 12.1(a). The interplay between these two agencies was partially described by this court in *United States* v. *Imperial Food Imports,* 834 F.2d 1013 (Fed. Cir. 1987), as follows:

> When importing foodstuffs the importer or its broker must notify the FDA, which may issue a 'may proceed notice.' However, the FDA may determine that the merchandise should not be permitted to enter the country without proof of compliance with 21 U.S.C. § 381(a)(3) (1982), which concerns adulterated food. In such a case, the FDA will issue a Notice of Sampling, 21 C.F.R. § 1.90, and often a Notice of Detention and Hearing, 21 C.F.R. § 1.94. If the importer does not respond to the Notice of Detention within ten days, a Notice of Refusal of Admission is issued, 21 C.F.R. § 1.94. The importer then has ninety days to either export or destroy the foodstuffs. If the importer has not

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[10] 21 U.S.C. § 381 (1982) states in part:

§ 381. Imports; list of registered foreign establishments; samples from unregistered foreign establishments; examination and refusal of admission

(a) The Secretary of the Treasury shall deliver to the Secretary of Health and Human Services, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, * * *. If it appears from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions or, * * * (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded, or in violation of section 355 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations * * *.

Same; disposition of refused articles

(b) Pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of such article to the owner or consignee upon the execution by him of a good and sufficient bond providing for the payment of such liquidated damages in the event of default as may be required pursuant to regulations of the Secretary of the Treasury. If it appears to the Secretary of Health and Human Services that an article included within the provisions of clause (3) of subsection (a) of this section can, by relabeling or other action, be brought into compliance with this chapter or rendered other than a food, drug, device, or cosmetic, final determination as to admission of such article may be deferred and, upon filing of timely written application by the owner or consignee and the execution by him of a bond as provided in the preceding provisions of this subsection, the Secretary of Health and Human Services may, in accordance with regulations, authorize the applicant to perform such relabeling or other action specified in such authorization (including destruction or export of rejected articles or portions thereof, as may be specified in the Secretary's authorization). All such relabeling or other action pursuant to such authorization shall in accordance with regulations be under the supervision of an officer or employee of the Department of Health and Human Services designated by the Secretary of Health and Human Services, or an officer or employee of the Department of the Treasury designated by the Secretary of the Treasury.

> acted after ninety days, Customs issues a Notice of Redelivery, 19 C.F.R. § 141.111 [sic § 141.113]. If the importer fails to comply by delivering the goods, the importer breaches its bond with Customs.

Id. at 1014. Not discussed in *Imperial Food,* however, is the exception in section 381(b) to the requirement in section 381(a) that the Secretary of Treasury is to destroy inadmissible foodstuffs that are not voluntarily exported by the importer.

Under 381(b), if the FDA is satisfied, upon request of the importer, *see* 21 C.F.R. § 1.94(b), that articles refused admission may be brought into compliance by "relabeling or other action specified in such authorization (including destruction or export of rejected articles or portions thereof * * *)," the shipment may be relabeled, etc. under the supervision of an officer or employee of the FDA or the Customs Service. More specifically, in order to avoid the harsh consequences dictated by section 381(a),[11] an importer whose shipment is denied entry solely under clause (3) of section 381(a) (due to adulteration, misbranding, or a violation of 21 U.S.C. § 355) may request authorization to recondition the shipment in order to bring the same into compliance with U.S. law. 21 C.F.R. §§ 1.94–1.96.

The burden to seek authorization to recondition the goods is upon the importer. An importer's failure to do so leaves him only with a choice of voluntary exportation (or destruction, *see* 19 C.F.R. §§ 158.41, 45(c)) or redelivery to Customs. If the importer seeks authorization, however, and successfully satisfies the FDA that relabeling, etc. the goods will lead to compliance, final determination on the admissibility of the goods will be deferred pending such relabeling or other action. The execution of a bond by the importer is required to secure the government's interests in assuring that the goods are properly reconditioned. 21 C.F.R. § 1.97.

D. Having considered the framework of section 381, the parallel between section 381(a) and paragraph 4 of the appended entry bond is clear. Paragraph 4 protects the government in the event that an importer fails to redeliver inadmissible foodstuffs to Customs' custody upon demand by the district director. Default in that obligation results in the liability for liquidated damages for the importer, 19 C.F.R. § 141.113(g), and upon the importer's surety under the bond, 19 C.F.R. § 172.1(a).

Likewise, it is clear that paragraph 7 of the bond protects the government's interest under section 381(b). Under paragraph 7 of the bond, if an importer requests authorization to recondition inadmissible goods and is granted permission from FDA to do so, but de-

[11] As indicated in *Imperial Food,* foodstuffs denied entry must either be exported or destroyed, voluntarily by the importer; otherwise Customs must demand redelivery for destruction by the government. Section 381(b) is the only exception to that mandate.

faults in complying with the authorization, the importer and the surety are liable for liquidated damages.[12]

The facts underlying this appeal are insufficient, as a matter of law, to support Customs' demand for liquidated damages under paragraph 7 of the entry bond. Liability under that paragraph lies only when the importer requests and is granted authorization to recondition his goods in accordance with section 381(b) and then defaults in his obligation. Here liability does not lie under paragraph 7 of the entry bond because Toshoku never sought to recondition the shipment in order to bring the goods into compliance with U.S. law. The exception in section 381(b) to section 381(a) was not invoked by Toshoku. No liability, therefore, can be imposed based on the failure of Toshoku to recondition in a manner authorized by section 381(b).

The boilerplate direction in the Notice of Refusal of Admission purporting to require exportation of the inadmissible goods or risk their destruction does not impose upon the importer an affirmative obligation to export the goods. Neither does the parallel language in section 381(a). Instead, the importer may, at his option, choose to export the goods (or voluntarily destroy them) in order to avoid their destruction by Customs. By complying with the exporting (or destruction) option the importer will save the costs charged him for having Customs destroy the goods, 21 U.S.C. § 381(c), and will obtain a refund of the estimated duties tendered, 19 C.F.R. §§ 158.41, 45(c) (prohibited merchandise "*may* be exported under Customs supervision in accordance with §§ 18.25–18.27 of this chapter, with refund of any duties that have been paid" (emphasis added)). However, in the alternative, the importer may, when Notice to Redeliver is given by Customs, redeliver the goods to Customs for destruction.

In its decision, the Court of International Trade determined that 19 C.F.R. § 12.4 created an affirmative obligation to export prohibited merchandise in accordance with 19 C.F.R. §§ 18.25 and 18.26. Section 12.4, however, does not require exportation, but only provides that the exportation of inadmissible goods must be in accordance with sections 18.25 and 18.26. These provisions, therefore, merely prescribe *how* merchandise is to be exported. *See also* 19 C.F.R. § 158.45(c) (which refers to sections 18.25–18.27 for directions concerning how to export inadmissible goods). Exportation, however, is optional to the importer.

Because the conditions necessary to recovery under paragraph 7 of the bond were not satisfied, the Court of International Trade erroneously awarded summary judgment in favor of the government.

REVERSED

[12]Under Customs' current practice, Customs Bond Form 301 has replaced Customs Form 7595 here in issue. Instead of including the bond conditions on its face as did its predecessor, Form 301 incorporates by reference the conditions provided at 19 C.F.R. § 113.62 (1988). *See* T.D. 84–213 (effective February 18, 1985). Condition (e) of that regulation comports with the language of paragraph 7 of the now superceded bond and is entitled "Agreement to *Rectify Any Noncompliance* with Provisions of Admission" (emphasis added).

(Appeal No. 88–1400, 88–1476)

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., AND CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFFS-APPELLANTS *v.* UNITED STATES AND MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, DEFENDANTS-APPELLEES

Joseph S. Kaplan, of Ross & Hardies, New York, New York, argued for plaintiffs-appellants. Of counsel was *Andrew Jaxa-Debicki,* of O'Connor & Hannan, Washington, D.C.

Velta A. Melnbrencis, of the Civil Division, Department of Justice, Washington, D.C., argued for defendants-appellees. With her on the brief were *John R. Bolton,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel were *Robert H. Brumley,* Deputy General Counsel, *Stephen J. Powell,* Chief Counsel for Import Administration, and *Craig L. Jackson,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Appeal No. 88–1502)

CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFF-APPELLEE, CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. AND CEMENTOS VERACRUZ, S.A. DE C.V., PLAINTIFFS *v.* UNITED STATES AND WILLIAM VERITY, SECRETARY OF COMMERCE, DEFENDANTS-APPELLANTS, GIFFORD HILL & CO., INC. AND KAISER CEMENT CORP., DEFENDANTS

Joseph S. Kaplan, of Ross & Hardies, New York, New York, argued for plaintiffs-appellee. Of counsel was *Andrew Jaxa-Debicki,* of O'Connor & Hannan, Washington, D.C.

Velta A. Melnbrencis, of the Civil Division, Department of Justice, Washington, D.C., argued for defendants-appellants. With her on the brief were *John R. Bolton,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel were *Robert H. Brumley,* Deputy General Counsel, *Stephen J. Powell,* Chief Counsel for Import Administration, and *Craig L. Jackson,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Appealed from: U.S. Court of International Trade.
Judge AQUILINO.

(Decided July 13, 1989)

Before RICH, NIES, and NEWMAN, *Circuit Judges.*

PER CURIAM.

These appeals are from conflicting final judgments of the Court of International Trade in three actions brought by exporters of portland hydraulic cement and cement clinker from Mexico. In each of the three actions, the exporters challenged the authority of the United States to impose countervailing duties on Mexican cement entered during the later part of 1983 and in all of 1984. Although the actions were distinct (due to different dates of entry and differ-

ent exporters), the exporters' arguments in each action were substantially identical.

In 88–1400, a group of Mexican exporters appeal the first decision of the Court of International Trade, *Cementos Guadalajara, S.A.* v. *United States,* 686 F. Supp. 335 (CIT 1988), in which Judge Carman awarded judgment to the United States, permitting the United States to impose countervailing duties on entries made during calendar year 1984.

In 88–1502, the United States appeals the second decision of the Court of International Trade, *Cementos Anahuac del Golfo, S.A.* v. *United States,* 687 F. Supp. 1558 (CIT 1988), in which Judge Aquilino, in response to substantially the same arguments the first group of exporters made to Judge Carman, awarded judgment to a second group of exporters and enjoined the United States from imposing countervailing duties on entries made between July 1, 1983, and December 31, 1983.

In 88–1476, a third group of Mexican exporters appeal the third decision of the Court of International Trade, *Cementos Anahuac del Golfo, S.A.* v. *United States,* 689 F. Supp. 1191 (CIT 1988), in which Judge Carman again awarded judgment to the United States, permitting the United States to impose countervailing duties on entries made during calendar year 1984.

Our jurisdiction is under 28 U.S.C. § 1295(a)(5) (1982). We *affirm* the judgment in number 88–1400 on the basis of Judge Carman's opinion, *Cementos Guadalajara, S.A.* v. *United States,* 686 F. Supp. 335 (CIT 1988), which we adopt. Similarly, we *affirm* the judgment in 88–1476 on the basis of Judge Carman's opinion, *Cementos Anahuac del Golfo, S.A.* v. *United States,* 689 F. Supp. 1191 (CIT 1988), which we adopt, except for the portions, not appealed, which discuss whether the methodology used by the United States to compute subsidies was correct and whether the United States was required to use a country-wide subsidy rate rather than a company-specific subsidy rate. 689 F. Supp. at 1214–16. We *reverse* the judgment in 88–1502 because it is based upon reasoning and analysis which conflicts with Judge Carman's opinions which we have adopted.

Costs

Each party shall bear its own costs.

AFFIRMED AS TO 88–1400 AND 88–1476
REVERSED AS TO 88–1502

(Appeal No. 88-1602)

RHONE POULENC, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

James A. Geraghty, of Donohue and Donohue, New York, New York, argued for plaintiff-appellant.

Joseph I. Liebman, of the International Trade Field Office, New York, New York, argued for defendant-appellee. With him on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director, and *Mark S. Sochaczewsky,* of the Civil Division, Department of Justice.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Decided July 14, 1989)

Before MARKEY, *Chief Judge,* SKELTON, *Senior Circuit Judge,* and NIES, *Circuit Judge.*

MARKEY, *Chief Judge.*

Rhone Poulenc, Inc. (Rhone), appeals from a denial of its motion to vacate an order dismissing 12 actions then on the trial court's suspension disposition calendar. *Rhone Poulenc, Inc.* v. *United States,* 694 F. Supp. 1579, (Ct. Int'l Trade 1988). The trial court held that it lacked "jurisdiction" to grant the motion. We reverse and remand[1]

BACKGROUND

The involved civil actions had been suspended pending the final disposition of *Rhone Poulenc* v. *United States,* 11 CIT ——, Slip Op. 87-75 (June 26, 1987). In that "test" case, the trial court agreed with Rhone that synthetic silica was classifiable duty-free under item 523.11 TSUS. When that decision became final, the involved actions were transferred to the "suspension disposition calendar." By notice dated October 29, 1987, the clerk of the court set April 30, 1988 as the suspense date for removal from that calendar. That date was 8 months after the test case decision, rather than the 18 months permitted by the court's rule. The parties actively pursued the customary process of preparing stipulated judgments for the suspended actions. Because the actions were not removed from the calendar by the suspense date, they were dismissed by the clerk on May 6, 1988.[2] On June 8, 1988, 33 days after the dismissal orders were entered, Rhone moved under court rule 60(b)(1) to vacate the dismissals and restore the actions to the suspension disposition calendar.

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[1]Briefs *amicus curiae* were filed by the Customs and International Trade Bar Association and the Customs Law Committee of the Los Angeles Bar Association.

[2]Other actions by Rhone involving importations of synthetic silica and the same classification issue were not dismissed and are not involved in this appeal.

The trial court concluded that *if* it had power to grant equitable relief under court Rule 60(b), it would "find [Rhone] has an appropriate basis to set aside the dismissal orders," and that "[t]he interests of justice strongly support settlement between the parties," citing *W.R. Filbin & Co.* v. *United States,* 11 CIT ——, Slip Op. 87–134 (Dec. 9, 1987). 694 F. Supp. at 1583. The court held, however, that it could not grant Rhone's motion because the United States Court of Customs and Patent Appeals (CCPA) had held in *United States* v. *Torch Manufacturing Co., Inc.,* 509 F.2d 1187 (CCPA 1975) that the predecessor United States Customs Court lacked jurisdiction to do so. 694 F. Supp. at 1583.

Issue

Whether the Court of International Trade has power to grant Rhone's motion.

OPINION

Introduction

With this case, the United States Court of International Trade passes another milestone in its march toward full maturity within the federal judiciary. It is a national court under Article III of the Constitution, having evolved from the Board of General Appraisers and the Customs Court. With nationwide geographic jurisdiction, its members have traditionally been appointed from the various States and have held court at places throughout the nation. Its Chief Judge sits as a member of the Judicial Conference of the United States and its members serve on committees of that Conference. Under designation by the Chief Justice, its members sit on the federal district and appellate courts. In the Customs Courts Act of 1980, Pub. L. 96–417, 94 Stat. 1724 (Oct. 10, 1980) (Act), Congress advanced the maturing process when it granted the court "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (1982). The legislative history contains the statement that the Act "perfects the status" of the court "by providing it with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution." H.R. Rep. No. 96–1235, 96th Cong., 2d Sess. 18–20 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729–3731. We hold here that that grant and that statement mean precisely what they say.

Jurisdiction

At the heart of this case lies an indiscriminate use of the naked term "jurisdiction." Use of that term unmodified has frequently provided fertile ground for the growth of obfuscation. Assuming the presence of a constitutionally required case or controversy, federal court jurisdiction comes in many shapes and sizes; hence under-

standing frequently requires an adjectival modifier. There are significant distinctions, for example, between subject matter jurisdiction, in personam jurisdiction, in rem jurisdiction, geographic jurisdiction, diversity jurisdiction, and pendent jurisdiction. Similarly, a distinction is required between the question of whether a court has subject matter jurisdiction as defined by Congress and the question of whether a plaintiff has failed to state a claim or lacks standing to invoke that jurisdiction. A further distinction exists between a court's subject matter jurisdiction and its inherent powers, i.e., those incidental powers necessary and proper to an exercise of that jurisdiction. Lastly, and most important for our purposes here, there is a fundamental distinction between a court's subject matter jurisdiction and its equitable powers. The former must exist before the latter may be exercised. The former concerns the authority of a court to hear and decide, given the subject matter of the case; the latter concerns the remedial relief of a court having that authority may grant.

Failure to recognize the last-named distinction is illustrated by the trial court's use throughout its analysis, and by the government's use throughout its brief here, of only the naked term "jurisdiction". The distinction is blurred also by the use in some quarters of the mongrelized phrase "equity jurisdiction". In an effort to diffuse the potential for confusion, the Court of International Trade (Re, C.J.) said this in *American Air Parcel Forwarding Co.* v. *U.S.*, 515 F. Supp. 47, 51 (Ct. Int'l Trade 1981):

> Jurisdiction, the power to decide a case presented for adjudication, should not be confused with a court's so-called "equity jurisdiction". When a court has jurisdiction over the subject matter and the parties, it has the power to decide the case, and "equity jurisdiction" can only refer to its authority and discretion to grant equitable relief. The words refer to those types or classes of cases formerly heard by courts of equity, as distinguished from the ordinary courts of law. In view of the merger of law and equity, the courts may grant any proper relief whether formerly denominated legal or equitable. Hence, to say that a court has "equity jurisdiction" is merely to say that it is authorized to exercise those equitable powers formerly devised or exercised by courts of equity. As a practical matter, it implies that a court is authorized to grant or withhold any of the equitable remedies.

It cannot be disputed that under 28 U.S.C. § 1581 the trial court has subject matter jurisdiction here. It properly exercised that subject matter jurisdiction in deciding the test case, and, if the 12 actions here involved are removed from the suspension disposition calendar, it will properly exercise that same subject matter jurisdiction in disposing of them. Hence no question of *that* "jurisdiction" is here presented. And, because 28 U.S.C. § 2646 does not apply to a court rule 60(b) motion, no question of statutory time limitation on the exercise of jurisdiction is present. The true and only question on

this appeal is whether the trial court has the power to grant the equitable remedy sought by Rhone's motion.

TRIAL COURT ANALYSIS

Exhibiting what would in a proper case be admirable restraint and adherence to precedent, the trial court reasoned that it lacked "jurisdiction" because: (1) 28 U.S.C. § 2646 (1982)[3] requires that a motion "for retrial or rehearing" be brought within 30 days of the judgment or order; (2) 28 U.S.C. § 2646 is substantively identical to the provision, 28 U.S.C. § 2639, held in *Torch,* 509 F.2d at 1187, to be jurisdictional, and (3) the trial court's Rule 60(b)[4] does not "independently confer jurisdiction" because "no court rule can enlarge or restrict jurisdiction." 694 F. Supp. at 1581–83. The court further reasoned that (4) relief is not available under 28 U.S.C. § 1585 or 28 U.S.C. § 2643(c)(1)[5] because "those statutes cannot independently confer jurisdiction where none otherwise exists" and no court "can exercise equitable powers where jurisdiction does not lie." 694 F. Supp. at 1583.

(1) U.S.C. § 2646

It is useful, always, to remain cognizant of the matter at hand. The present appeal involves no substantive law, but only the ministerial, housekeeping, docket-managing function of the trial court. When there are actions filed in relation to numerous importations of essentially the same product, one action is selected as a "test case" and tried, and the others are placed on the "suspension disposition calendar." The court is normally thereafter not involved with the "suspended" actions. As above indicated, the suspended actions are removed from the calendar by the clerk upon receipt of stipulations by the parties.[6] Actions not timely removed from the calendar are dismissed by the clerk. Rhone's motion under court Rule 60(b) thus sought relief from a dismissal order issued by the clerk under court rule 85(d).[7]

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[3]28 U.S.C. § 2646 reads:

> After the Court of International Trade has rendered a judgment or order, the court may, upon the motion of a party or upon its own motion, grant a retrial or rehearing, as the case may be. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment or order.

[4]Court rule 60(b) reads in pertinent part:

> On motion of a party * * * the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, * * *.
>
> The motion shall be made within a reasonable time, and for [reason of mistake, inadvertence, surprise, or excusable neglect] not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

[5]28 U.S.C. § 2643(c)(1) reads:

> Except as provided in paragraphs (2), (3), and (4) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief which is appropriate in a civil action, including but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

[6] Though not reflected in the record, there are, presumably valid reasons for not simply disposing of the suspended actions on the basis of the decision in the "test" case.

[7]Court rule 85(d) reads:

> An action not removed from the Suspension Disposition Calendar within the established period shall be dismissed for lack of prosecution, and the clerk shall enter an order of dismissal without further direction of the court, unless a motion is pending.

Rhone's was clearly and inescapably *not* a motion for "retrial or rehearing".[8] The statute, 28 U.S.C. § 2646, and court rule 59 remain intact and applicable to motions for retrial or rehearing. Neither the statute nor the rule, however, says anything whatever about "jurisdiction" or about a time period during which one must file a motion for relief in the form of restoration of actions dismissed by the clerk under the court's rule 85(d). When Rhone filed its motion, there had never been a "trial" or "hearing" on the clerk's order or on whether it should be vacated. Nor had there been a trial or hearing in any of the 12 suspended cases. Nor was there either opportunity or reason for such a trial or hearing before the clerk entered his order. It is at best difficult, therefore, to conceive of a present-day basis for labeling or treating Rhone's motion, filed under the court's rule 60(b) and seeking equitable relief from a ministerial order, as one for either *re*trial or *re*hearing.[9]

In *Bio-Rad Laboratories, Inc.* v. *United States,* 687 F. Supp. 1580–81 (Ct. Int'l Trade 1988) another judge of the Court of International Trade said:

> In the opinion of the Court the terms of 28 U.S.C. § 2646 apply to the rehearings available under Rule 59, namely, rehearings which are directed to issues which were treated, revealed, or advanced in the original trial, decision or judgment. For that sort of motion, i.e., to rehear what has been done in plain sight, a limit of 30 days in proper. But for the motion made under Rule 60 and based on reasons which often depend on the discovery of hidden mistakes, frauds, or other causes of injustice, which cannot be expected to be uncovered immediately after judgment, it would be absurd and unfair to apply the 30 day statutory limit of 28 U.S.C. § 2646. It would be equally absurd to attribute such an intention to Congress.

There is thus a direct conflict between the reasoning in *Bio-Rad* and that in the case *sub judice.* The trial court here noted that reasoning but simply dismissed it with the statement: "The Court finds the controlling law is that expressed in *Torch*" which "states the 30 day time period is a jurisdictional matter" and "is a binding precedent". 694 F. Supp. at 1583.[10] The trial court did not consider

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[8]In *United States* v. *Porter,* 645 F.2d 52, 57 (CCPA, 1981), the court rejected the government's effort to assert § 2639 as a bar to a motion to amend a judgment brought under the court's rule 12.2, a predecessor of its rule 60(b):

> The Government maintains that such discretion should be confined by the thirty day limit of 28 U.S.C. § 2639. That statute deals with retrials and rehearings, and no basis is seen for equating a motion thereunder with a motion to amend like that here involved.

In *Porter,* the CCPA also presaged our rejection here of the government's notion that case law dealing with the Federal Rules of Civil Procedure cannot be looked to in applying corresponding rules of the Court of Internal Trade:

> In view of the one year limitation on similar motions to amend a judgment under FRCP 60(b), we do not consider unreasonable the passage of 46 days in filing a motion to amend under CIT Rule 12.2.

Id.

[9]Repeatedly in the government's brief appears the unexplained, flat-like statement that Rhone's motion is "in effect a request for rehearing." Nothing here said would authorize the Court of International Trade to grant an actual motion for retrial or rehearing filed more than 30 days after the date of entry of a judgment or order. 28 U.S.C. § 2646.

[10]The trial court nowhere mentioned the 1986 Report of its Committee on Rules and Practice (Rules Committee Report). In recommending that the time in which to move under Rule 60(b) be increased from 30 days to the

Continued

whether *Torch* had been overruled by Congress and said nothing about whether 28 U.S.C. § 1585 had any effect on *Torch*. Employment of the application in *Torch* of 28 U.S.C. § 2639 (predecessor of § 2646) as the foundation stone of the trial court's analysis renders necessary a discussion here of whether *Torch* remains a viable precedent governing motions of the type filed by Rhone.

(2) TORCH

In *Torch,* the Customs Court granted a motion to restore an action to the Reserve File (predecessor of the suspension disposition calendar). The CCPA reversed, noting the truism that a court may not enlarge its own "jurisdiction". 509 F.2d at 1189. The CCPA recognized the continuity of the 30-day limit for motions for rehearing or retrial in quoting § 518 of the Tariff Act of 1922 (applicable to the Board of Appraisers), 28 U.S.C. § 2640, and its virtually identical successor 28 U.S.C. § 2639. Because the Customs Court was known to lack equitable powers,[11] and there was at the time no court rule 60(b), the CCPA was forced to employ the legal fiction that a motion to vacate and restore was a motion to rehear, to look only to § 2639, and to speak in only "jurisdictional" terms.

Though couched in "jurisdictional" terms, the holding in *Torch* turned on the Customs Court's lack of equitable power. Noting the government's acknowledgment of the merits of plaintiff's claim and stating that the equities favored plaintiff, the CCPA nonetheless concluded in *Torch* that the Customs Court "had no power" to "cure" plaintiff's failure to comply with § 2639 and suggested that "relief on the basis of such equities" must come from "legislation in the Congress.," *Id.* at 1192.

The "power to cure" found missing in *Torch* has now been supplied by "legislation in the Congress." As above indicated, Congress has expressly and unequivocally provided that "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585.[12] It is not and cannot be disputed that a district court has the power in equity to grant, under Rule 60(b), Fed. R. Civ. P., the type of relief Rhone seeks. Under Section 1585, the Court of International Trade now has that same power in equity.

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one-year found in the Federal Rule, the Committee set forth the same distinction later made in *Bio-Rad.* Rules Committee Report at 2. It also distinguished *Torch* as having been decided before the court was granted equitable powers. Id. at 3–4. The Committee's recommendation was adopted by the full court and its rule 60(b) was amended. A court committee report is not the equal of a controlling court decision, yet to ignore it as though it had never been rendered and adopted would appear to undermine institutional integrity without compensating benefit of any kind to anyone.

[11] It had long been so held. *See Matsushita Electric Industrial Co., Ltd.* v. *United States Treasury Department et al.*, 67 Cust. Ct. 328, C.D. 4292 (1971), *aff'd*, 60 CCPA 85, C.A.D. 1083 (1973), *cert. denied* 414 U.S. 821; *Eurasia Import Co., Inc.* v. *United States*, 31 CCPA 202, C.A.D. 273 (1944); *Jacksonville Paper Co.* v. *United States*, 30 CCPA 159, C.A.D. 228 (1943), *cert. denied*, 320 U.S. 737.

[12] The government here suggested that Rhone seek relief from Congress. As indicated in the text, the government simply disregards the congressional grant of authority to grant precisely the equitable relief Rhone seeks in this case.

The view expressed in *Torch*, that case law on the Federal Rules is not applicable to rules of the Court of International Trade, cannot survive the enactment of § 1585 and the adoption by the court of rules corresponding as nearly as possible to the Federal Rules.

Thus, as not infrequently occurs in the field of international trade, Congress has acted to fill a gap in the law identified in a court holding, *see,* e.g., *United States* v. *Zenith Radio Corp.,* 562 F.2d 1209, 1216, n.13 (CCPA 1977), *aff'd,* 437 U.S. 443 (1978), and, upon enactment of § 1585, *Torch* became no longer a viable precedent.[13] The trial court therefore erred in finding that *Torch* expressed "the controlling law."

(3) Rule 60(b)

The trial court stated that court rule 60(b) does not "independently confer jurisdiction." That rule 60(b) does not confer subject matter jurisdiction is a truism. It is also irrelevant. Simply stated, rule 60(b) has nothing to do with conferring "jurisdiction"; it has to do with, and only with, the exercise of a court's equity power.

As clearly stated in its first sentence, rule 60(b) deals with a court's power to "relieve a party" from a final "judgment, order, or proceedings." An exercise of that power thus occurs only after a court has completed a trial or proceeding over which it had, or thought it had, subject matter jurisdiction, and only after it has entered a final judgment or issued a final order. The power to relieve a party from a final judgment or order is quintessentially and obviously a power to do equity and a court's decision on a 60(b) motion is governed by equitable principles. *See* C. Wright and A. Miller, *Federal Practice and Procedure,* § 2857 at 158–59 (1973) (and cases cited therein); *DeVito* v. *Fidelity and Deposit Company of Maryland,* 361 F.2d 936, 939 (7th Cir. 1966).

If a court has power to relieve a party from a final judgment entered by the court on completion of a trial on the merits, it would appear at best incongruous to suggest that that same court lacks power to relieve a party from a clerk's ministerial order dismissing an action.[14]

Before us, the government repeats the trial court's truism that "the CIT cannot enlarge its jurisdiction by its own rules". The government also parrots the trial court's view that court rule 60(b) cannot be equated with Rule 60(b), Fed. R. Civ. P. because the latter renders "all laws in conflict with such rules" of "no further force or effect." 28 U.S.C. § 2072. The analysis of the trial court and the government is thrice flawed: (1) as above indicated, rule 60(b) is unrelated to "jurisdiction" and the analysis ignores its own false corollary (that Federal Rule 60(b) does "enlarge the jurisdiction" of the district courts); (2) the analysis begs the question in assuming that the court's rule 60(b) is in "conflict" with some unidentified "law" (presumably Section 2646); and (3) the analysis disregards its necessary consequence, i.e., the nullifying of court rule 60(b) and the stul-

[13]Congress having acted, it is not necessary that this court act *in banc* as envisaged in *South Corp.* v. *United States, 690 F.2d 1368, 1370 n.2 (Fed. Cir. 1982). The same is true in respect of United States* v. *Consolidated Merchandising Co.,* 527 F.2d 640 (CCPA, 1976).

[14]That the court rule makes the clerk's dismissal order one "on the merits" thus has no effect on the power of the court to vacate the order in response to a motion under court rule 60(b).

tifying of the statutory grant of equitable powers, Section 1585, on which that rule rests.[15]

Court rule 60(b) was legitimately promulgated, following Congress' grant of equity powers in 18 U.S.C. § 1585. Hence the government's *sub silentio* effort to gut that rule of all meaning (because "the Federal Rules are applicable only to the district courts") goes beyond the bounds of legitimate advocacy. It is also short-sighted, the rule being neutral and of equal benefit to the government in a proper case.

Indeed, the government's effort here to confine and cabin the rule-making and equity powers of the Court of International Trade defies understanding, unless viewed as stemming from a nostalgic desire that all things remain as they had long been in its litigation before the Customs Court. The government's assertion that court rule 60(b) is "unauthorized" by 28 U.S.C. § 2071[16] because it "enlarge[s] the CIT's jurisdiction" is a particularly egregious example of that effort.[17] The Court of International Trade is a "court established by Congress", P.L. 84–703; H. Rept. No. 2348, 84 U.S. Code Cong. & Admin. News, at 3122–23 (1956); its rule 60(b) is clearly "inconsistent with Acts of Congress" (*see* e.g., 28 U.S.C. § 1585) and with "rules and practice and procedure prescribed by the Supreme Court" (*see* substantially identical Rule 60(b), Fed. R. Civ. P.).[18]

Nowhere does the government acknowledge the long-recognized distinctions between motions for retrial or rehearing and motions for relief from judgment. We list only one. The former suspends finality. 28 U.S.C. § 2645(c). The latter does not. Indeed, the latter comes into play only after a judgment becomes final, no adequate remedy at law exists, and equitable relief is available, *see* 7 J. Moore, *Federal Practice*, ¶60.20 (2d ed. 1987) (and cases cited therein), and the need to exercise a court's power in equity arises. It may have been necessary to ignore distinctions among remedies in the past. Upon enactment of 28 U.S.C. § 1585, making equitable relief available, the need to ignore them ceased, for a grant of an equitable remedy cannot be affected by a time limit imposed on a grant of the entirely distinct remedy of a rehearing.

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[15]Responding to an Amicus' reference to the Rules Committee Report, n.10, *supra*, the government dismisses in a single sentence the Report and the court's rule 60(b) with another mantra-like repetition of "the CIT cannot enlarge its own jurisdiction." Neither the trial court nor the government appears to have recognized that their treatment of § 2646 as an absolute bar to motions brought under rule 60(b) more than 30 days from the date of the order renders fruitless the court's 1986 amendment of its rule 60(b), *supra*, n.10. Neither appears to recognize any distinction between a court's power to retry or rehear and its power to vacate a judgment or order.

[16]28 U.S.C. § 2071 reads:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules and practice and procedure prescribed the Supreme Court.

[17]The government argues as though the Court of International Trade had promulgated a rule granting more than 30 days in which to file a motion for retrial or rehearing. It has not done so. Its rule 59 deals with motions for retrial and rehearing and imposes the same 30 day limit imposed by § 2646.

[18]As part of its attack by indirection on the legitimacy of the rule, the government devotes two pages of its brief to testimony on a non-enacted bill, in which testimony it was suggested that the Customs Court be authorized to adopt the substance of rule 60(b). As indicated in the text, *infra*, the government disingenuously ignores Congress' subsequent enactment of 28 U.S.C. § 1585, which gave the court not only the power exercisable under rule 60(b), but *all* the equitable powers of a district court.

(4) 28 U.S.C. § 1585

Exhibiting an appalling lack of candor, the government's brief nowhere even mentions 28 U.S.C. § 1585, the statute granting the Court of International Trade "all the powers in * * * equity" of the district court. Unwilling for some reason to assist this court by supplying the benefit of its view on the effect of Section 1585, and citing no legal theory requiring limitation of the court's equitable powers, the government simply ignores the arguments of Rhone and *amici* founded on Section 1585.

The government's silence may be explainable in light of the plain meaning of Section 1585. For the government to say Section 1585 does not fill the gap identified in *Torch*, does not support the court's adoption of rule 60(b), and does not grant the court the equity power needed to deal with Rhone's motion, would be to argue that § 1585 is a nullity. Lacking the kidney to so argue, and unwilling to confess error in the trial court, the government simply pretends that § 1585 does not exist.

At liberty to disregard no statute, this court is required to uphold all, and to reconcile, when necessary and possible, those in apparent conflict. *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 926, 1018 (1984); *United States* v. *Borden*, 308 U.S. 188, 199 (1939). There is, of course, no conflict between Sections 2646 and 1585, the former setting a time limit for motions for retrial or rehearing, the latter granting the equitable power to, *inter alia*, vacate a final order. Similarly, there is no conflict between court rules 59 and 60(b) adopted under the authority of Sections 2646 and 1585, respectively.

As above indicated, the trial court dismissed Sections 1585 and 2643(c)(1) on the sole truism that a court cannot exercise equitable powers where "jurisdiction" does not lie. Equitable remedial powers, however, aid a court in the exercise of its subject matter jurisdiction; they are not themselves jurisdictional predicates. Given the necessarily tortured treatment in *Torch* of motions like Rhone's, wherein such motions were placed in the only available pigeonhole (for retrial or rehearing under Section 2639) and Section 2639 was treated as "jurisdictional" because the Customs Court lacked equitable powers, the trial court's analysis is seen as an effort, albeit flawed, to apply *stare decisis*. The analytical error lay in not considering the vast change in the landscape of international trade jurisprudence effected by the enactment of Section 1585.[19]

EQUITABLE CONSIDERATIONS

A most disconcerting feature in this and past cases involving "suspended" actions has been the enforced enduring of recognized inequities and the consequent creation of injustice. As above indi-

[19]The power to grant relief from a final order is, of course, but one among many powers in equity granted by section 1585. The court's exercise of its informed discretion in the employment of all its equity powers in future cases cannot but aid its conduct of the judicial process.

cated, the trial court here thoughtfully noted and described Rhone's "inappropriate basis" for setting aside the clerk's dismissal order. In *Torch, Quigley & Manard* v. *United States,* 496 F.2d 1214, 1216 (CCPA 1974), and *Consolidated,* 527 F.2d at 641, the courts recognized that the equities were on the movant's side. In *Consolidated,* though the CCPA recognized and the government conceded that the motion's untimeliness was entirely the government's fault, the government nonetheless opposed the motion, citing section 2639. *Id.* In no instance is there the slightest indication that the government would have been prejudiced by a grant of the motion, and in *Torch* and *Consolidated* the government conceded that the motion had merit. Yet the courts, lacking equity power, were constrained to deny relief. The enactment of § 1585 now enables the Court of International Trade to avoid the stain of injustice in future cases in which the equities dictate return of an action to the suspension disposition calendar.

We do not, however, order a grant of Rhone's motion. That is a matter assigned in the first instance to the trial court's discretion. As above indicated, the sole issue on this appeal is whether the Court of International Trade has the power to grant a motion under court rule 60(b) to vacate a dismissal order and restore dismissed actions to the suspension disposition calendar. We hold that it does. The trial court's decision that it lacks "jurisdiction" to do so therefore cannot stand, its denial of Rhone's motion must be reversed, and the case must be remanded for further action on that motion.

Costs

Each party shall bear its own costs.

REVERSED AND REMANDED

Nies, *Circuit Judge,* concurring in the result.

Whether Rhone's motion is viewed as substantive or ministerial is irrelevant to the resolution of this case. Moreover, I disagree that the term "jurisdiction" was used inappropriately by the trial court or by the government. A time limit fixed by statute within which to file a motion is a *jurisdictional* restriction. *Accord Schacht* v. *United States,* 398 U.S. 58, 68 (1970) (Harlan, J., concurring) (The Supreme Court "treats time requirements imposed by statute as jurisdictional."). For example, the time limit of Fed. R. Civ. P. 60(b), because it is statutory, *see* 28 U.S.C. app. (1982), is jurisdictional. *See United States* v. *Marin,* 720 F.2d 229, 231 (1st Cir. 1983) (Fed. R. Civ. P. 60(b) time limit "is an absolute bar to relief from the judgment.") *See also* Fed. R. Civ. P. 60(b) advisory committee's note ("If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a

new or independent action to set aside a judgment upon these principles which have heretofore been applied in such an action.").

Unlike its federal rule counterpart, the provisions of CIT Rule 60(b) are not statutory, being merely court-adopted, and, therefore, are not jurisdictional. *See Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924) ("No rule of court can enlarge or restrict jurisdiction"); *Schacht*, 398 U.S. at 68 (Harlan, J. concurring) (not anomalous that time limitations of Supreme Court Rules are not jurisdictional while statutory time limits are jurisdictional). Nevertheless, if the statutory time period of 28 U.S.C. § 2646 (1982) were applicable to a motion under CIT Rule 60(b), that period would be a restriction on the "jurisdiction" of the Court of International Trade.

I agree with the majority that section 2646 does not apply to a CIT Rule 60(b) motion. The decision in *United States* v. *Torch Manufacturing Co.*, 509 F.2d 1187 (CCPA 1975), did not hold that section 2646 (formerly section 2639) *restricted* the time period for filing a Rule 60(b) motion. Because the Court of International Trade's predecessor, the United States Customs Court, had neither equity jurisdiction nor a Rule 60(b) at that time, section 2646 was interpreted to *grant* relief in compelling circumstances in what might be called a 60(b) situation. *Torch* held only that parties had to seek such relief within the time limits of section 2646. *Id.* at 1192. The necessity for that interpretation ended in 1980 when Congress granted that court "all the powers in * * * equity of * * * a district court of the United States," 28 U.S.C. § 1585 (1982), and the court adopted its Rule 60(b) pursuant to that authority. Thereafter, Rule 60(b)-type motions were decoupled from section 2646 and could be brought for what they are, motions for relief from judgment, and no longer needed to be deemed motions under section 2646 for rehearing or retrial. Thus, the *Torch* analysis has been preempted by the statutory change and by the court's exercise of its equity powers. In sum, a party that moves for relief within the one-year time requirement of CIT Rule 60(b), as Rhone did here, is entitled to have its motion heard. The thirty-day time requirement of section 2646 is inapplicable.

For the above reasons, I agree with the majority that the Court of International Trade has the authority under CIT Rule 60(b) to grant a motion to vacate the dismissal order at issue and that the case must be remanded.

(Appeal No. 89-1202)

HASBRO INDUSTRIES, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Peter Jay Baskin, of Sharretts, Paley, Carter & Blauvelt, New York, New York. With him on the brief were *M. Barry Levy* and *Ned H. Marshak*, of Sharretts, Paley, Carter & Blauvelt, New York, New York.

Saul Davis, of the Commercial Litigation Branch, Department of Justice, New York, New York, argued for defendant-appellee. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Decided July 12, 1989)

Before NIES, MAYER and MICHEL, *Circuit Judges*.

MICHEL, *Circuit Judge*.

Hasbro Industries, Inc. appeals the decision of the Court of International Trade, 703 F. Supp. 941 (Ct. Int'l Trade 1988), which determined that "G.I. Joe Action Figures" are within the common meaning of "dolls" and were properly classified as such under Item 737.24 of the Tariff Schedules of the United States (TSUS). We affirm.

BACKGROUND

The United States Customs Service classified "G.I. Joe Action Figures" imported from Hong Kong during 1982 and 1983 as "other dolls" under Item 737.24 of the TSUS. Under this classification, depending on the date of entry, various rates of duty applied. Hasbro argues that these toy figures are excepted from duty because they are properly classifiable as "Toy figures or animate objects (except dolls): Not having a spring mechanism: Not stuffed: Other" under Item A737.40, TSUS, and thus free of duty pursuant to General Headnote 3(c), TSUS. Hasbro contends that G.I. Joe is nothing more than a modern version of a traditional toy soldier.

G.I. Joe was originally introduced in 1964 as an 11½ inch figure. In 1976, Hasbro reduced G.I. Joe to 8½ inches and soon thereafter removed G.I. Joe from the market. When G.I. Joe was reintroduced in 1982, his Alice in Wonderland shrinkage had continued until he was only 3½ inches.

The articles in dispute are fully described in the opinion below:

> All the figures are made of plastic, are approximately 3½ inches tall, and have the appearance of human beings dressed and equipped in a manner associated with actual or fictional warfare. They are noticeably *lifelike* and constructed in a manner which permits an impressive range of movement. The head turns from side to side, the arms are jointed at the shoulder

> and elbow and also have a rotational joint above the elbow and a rotational joint capacity in the shoulder. They can turn at the waist and also bend slightly in all directions from the waist. The legs have a wide range of movement at the hip and sufficient bending action in the knees to allow the figure to kneel or sit. The articulated joints maintain the position in which they are placed by manipulation. (Emphasis added.)

703 F. Supp. at 942.

Each figure is packaged singly in a large plastic blister mounted on a large card which contains specific biographical information for each figure. For example, First Sergeant, Code Name: Duke, has the following personnel card:

> File Name: Hauser, Conrad S.
> SN: RA213757793
>
> Primary Military Specialty: Airborne Infantryman
>
> Secondary Military Specialty: Artillery, Small-arms armorer
>
> Birthplace: St. Louis, MO Grade: E-8 (Master Sergeant)
>
> Duke was fluent in French, German, and English when he enlisted in 1967. Graduated top of his class at airborne school, Fort Benning. Opted for U.S. Army Special Language School. Specialized in Han Chinese and South East Asian dialects. Went Special Forces in 1969. Worked with tribesmen in the boonies of South Vietnam. Ran four different Special Forces schools. Turned down a commission in 1971. Commands by winning respect. Current assignment: Acting First Sergeant, G.I. Joe team.
>
> Statement after declining commission. "They tell me that an officer's job is to impel others to take the risks—so that the officer survives to take the blame in the event of total catastrophe. With all due respect, sir * * * if that's what an officer does, I don't want any part of it."

In addition, each figure comes with its own specialized accessories. For example, First Sergeant comes with plastic pieces representing binoculars, a helmet, an assault pack, and an M–32 sub-machine gun.

Using lexicographic authorities and prior case law to establish the common meaning of the term "doll," the Court of International Trade determined that G.I. Joe action figures fell within that tariff term.

OPINION

Although the common meaning of a tariff term is a question of law, *Childcraft Education Corp.* v. *United States,* 742 F.2d 1413, 1414 (Fed. Cir. 1984) and therefore subject to de novo review, the determination whether a particular item fits within that meaning is a question of fact, *Brookside Veneers, Ltd.* v. *United States,* 847 F.2d 786, 788 (Fed. Cir.), *cert. denied,* 109 S. Ct. 369 (1988), subject to the clearly erroneous standard of review. *Id.* at 790–91. We note that

"[i]t is incumbent upon the importer in a case such as this to overcome the presumption of correctness which attaches to a classification by the Customs Service, and the importer has the burden of providing that the classification is incorrect, though the importer need not always prove that its own proposed classification is correct." (Citation omitted.) *Childcraft,* 742 F. 2d at 1414.

Item 737.24 of the TSUS is an *eo nomine* designation which includes all forms of the article. To determine the common meaning of a tariff term like "doll," it is well established that the court "may consult dictionaries, scientific authorities, and other reliable information sources to ascertain that common meaning." *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 673 F.2d 1268, 1271 (CCPA 1982). The Court of International Trade referred to a general dictionary defining the word "doll" as a representation of a human being used as a child's plaything. While we conclude that this summary definition is not an all-inclusive definition for the term "doll," we determine that it is suitable for this case.

Earlier cases cited by the Court of International Trade indicate that the term "doll" has been interpreted broadly by the courts. *See United States* v. *Cody Manufacturing Co., Rohner Gehrig & Co.,* 44 CCPA 87, 73–74 (1957); *see generally Ruds Berrie & Co.* v. *United States,* 417 F. Supp. 1035, 1039 (Cust. Ct. 1976) ("Equally well established is the concept that a doll for tariff purposes is not confined to playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation such as boudoir dolls, souvenir or prize dolls, dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc.") Hasbro has given no compelling reason for this court or the Court of International Trade to alter this interpretation.

Given this broad common meaning of the term "doll," we next review whether the Court of International Trade clearly erred when it found that the G.I. Joe action figure fit within that term. We determine it did not. The evidence of record includes testimony (including expert testimony), magazine articles referring to G.I. Joe as a doll, letters from purchasers to Hasbro also referring to G.I. Joe as a doll, doll collector books, and the imported articles themselves. The record supports the Court of International Trade's finding.

Finally, we turn to Hasbro's argument that the long established practice of the Customs Service is to exclude traditional toy soldiers from the tariff provision for dolls. Assuming, arguendo, that traditional toy soldiers are treated differently than dolls for tariff purposes, Hasbro's argument is not persuasive. As the Court of International Trade explained, the individual personality of each of these figures, as evidenced by his biographical file cards and physical characteristics inviting "intimate and manipulative" play, 703 F. Supp. at 946, indicates that these figures are not comparable to the identical, immobile faceless toy soldiers of yesteryear that were sold in groups of a dozen or so in bags. The G.I. Joe action figures do

come within the common meaning of the term "doll" as set forth in lexicographic authorities and earlier judicial decisions.

Accordingly, although Hasbro has fought valiantly that these figures are not dolls, we are unable to agree. Even though G.I. Joe has lost this battle, hopefully he will not lose his courage for combat, despite being officially designated by the United States Customs Service as a "doll."

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89-91)

MONARCH LUGGAGE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 85-11-01641

[Judgment in part for plaintiff; judgment in part for defendant.]

OPINION

(Decided June 28, 1989)

Grunfeld, Desiderio, Lebowitz & Silverman (*Steven P. Florsheim*) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Kenneth N. Wolf*) for the defendant.

BACKGROUND

MUSGRAVE, *Judge:* This action contests the United States Customs Service's (Customs) appraisement of certain entries of various luggage articles imported by plaintiff from Taiwan during the years 1981, 1984, and 1985. The Court has jurisdiction under 28 U.S.C. § 1581(a).

The parties agree that the proper basis of appraisement is Transaction Value, as defined in Section 402(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1401a(b) (1982). Plaintiff claims that the invoice F.O.B. values include "buying commissions" paid by plaintiff to the Taiwanese companies Krasa and Prosperous, which plaintiff claims are *bona fide* buying agents. Plaintiff contends that the entries should be reliquidated with duties assessed upon the invoice F.O.B. values, *excluding* the alleged buying commissions and requests that defendant be directed to refund to plaintiff the difference between the duties assessed upon reliquidation and the duties upon the invoice F.O.B. values, plus interest. Defendant contends that the subject luggage was properly appraised based upon the invoice F.O.B. values, identified on the invoices and/or debit notes attached to the entry papers.

DISCUSSION

It is well settled that *bona fide* buying commissions are not a proper element of dutiable value. *Rosenthal-Netter, Inc.* v. *U.S.*, 12 CIT ——, ——, 679 F. Supp. 21, 23 (1988), *aff'd*, No. 88–1294 (Fed. Cir. Nov. 10, 1988); *Jay-Arr Slimwear, Inc.* v. *U.S.*, 12 CIT ——, ——, 681 F. Supp. 875, 878 (1988). However, plaintiff bears the burden of proof in establishing the existence of a *bona fide* agency relationship and that the charges paid were *bona fide* buying commissions. *New Trends, Inc.* v. *U.S.*, 10 CIT 637, 640, 645 F. Supp. 957, 960 (1986); *See also, Pier 1 Imports, Inc.* v. *U.S.*, 13 CIT ——, Slip Op. 89–25 (February 23, 1989).

Plaintiff presented two witnesses at trial: Donald Liebowitz, Executive Vice President of plaintiff Monarch Luggage, and Richard Young, Managing Director of Prosperous and Krasa. Mr. Liebowitz testified that Monarch Luggage's primary business involves the importation of luggage products from the Far East. According to Mr. Liebowitz, the luggage importation business requires a "presence" in the exporting country in order to be successful. Mr. Liebowitz travels to Taiwan between three and six times a year for several weeks at a time. During these trips Mr. Liebowitz visits many of the various luggage manufacturers in Taiwan in order to meet them, to inspect their facilities, to place orders, to negotiate terms, and the like. This witness further testified that notwithstanding these frequent visits, a continuing presence in the form of a local agent who is familiar with the industry is also necessary.

Mr. Liebowitz testified that he met Mr. Young, Managing Director of both Prosperous and Krasa[1], during his first visit to Taiwan in 1977. At the end of this trip Mr. Young was told that his companies could be Monarch's agents in Taiwan. Plaintiff had a verbal agreement with Mr. Young until 1981, at which time the agreement was put in writing.

The agreement sets out the duties of Prosperous, referred to as "the Agent". The agreement sets out *inter alia* the following terms with respect to the duties of the agent. The agent is to attempt to obtain the best available source for merchandise. The agent may, only at the direction of the Principal, place orders with manufacturers. The agent shall arrange and coordinate payment to the manufacturer pursuant to the explicit instructions of the Principal. Upon instruction by the Principal, the agent shall arrange for inland freight storage, insurance, and the like. The agent shall visit the manufacturers in order to inspect the quality of the merchandise, and shall assist the Principal in the return of merchandise deemed to be defective. In the case of returned merchandise, the manufacturer, and not the agent, is required to absorb the loss. The agreement further states that the agent shall never act as a seller in any transaction involving the principal.

[1]Prosperous and Krasa are "sister" corporations, owned and operated by the same persons, at the same address, and will be referred to hereinafter solely as Prosperous.

All of the above services are characteristic of those rendered by a *bona fide* agent. *See, U.S.* v. *Nelson Bead Co.,* 42 CCPA 1975, C.A.D. 590 (1955); *Carolina Mfg. Co.* v. *U.S.,* 62 Cust. Ct. 850, R.D. 11640 (1969). But, of course, an agreement such as described above is not in itself dispositive of the issue. *Rosenthal Netter,* 12 CIT at ——, 679 F. Supp. at 26. Whether the relationship is one of agent-principal "is to be determined by the substance of the transaction—not by the labels the parties attach top it." *Pier 1 Imports, Inc.,* v. *U.S.,* 13 CIT ——, Slip Op 89–25 at 13 (quoting *Dorf Int'l, Inc.* v. *U.S.,* 61 Cust. Ct. 604, 610, A.R.D. 245, 291 F. Supp. 690, 694 (1968)).

At trial both witnesses testified as to the nature of their relationship and established to the satisfaction of the Court that the activities performed by Prosperous and Monarch were indicative of a agent-principal relationship generally. There is, however, one further factor which must be considered.

The merchandise at issue was entered into the United States during the years 1981, 1984 and 1985. Mr. Young testified, and the entry documents show, that during 1981 Prosperous' commission was deducted from the price paid for the merchandise. That is, the commission was calculated by dividing the F.O.B. price by .96. In response to the questioning by defendant's attorney at trial, Mr. Young admitted that this method of calculating its commission was improper. According to the statute, the transaction value of imported merchandise is "the price actually paid or payable for the merchandise when sold for exportation to the United States * * *" 19 U.S.C. § 1401a(b)(1) (1982). An amount which is paid for imported merchandise which is part of the purchase price is properly included in the dutiable value. *See, BBR Prestressed Tanks, Inc., et al.* v. *U.S.,* 64 Cust. Ct. 787, 788, A.R.D. 265 (1970). Because the amounts which plaintiff claims were buying commissions were part of the price paid for the merchandise for entries made prior to the change in invoicing procedures in the latter part of 1981, these amounts were properly included in the dutiable value for that period.

Mr. Young stated that the method of calculating Prosperous' commission described above ended some time during the latter half of 1981, though it is unclear what the exact date was. Since that time the commission has been calculated by multiplying the F.O.B. price by .04, and is paid for separately by check from Monarch to Prosperous. Thus, since the change in the method of calculation, Prosperous' commission has been an amount separate from and in addition to the price paid for the merchandise, and is therefore not properly included in the dutiable value of the merchandise.

It is troublesome that Prosperous calculated its purported buying commission by a method, or methods, prior to "late 1981", which method or methods made the commissions dutiable as part of the F.O.B. value, and continued this practice from sometime in 1977 until almost 1982. And a mere change in the method of invoicing, if it is only in form and really not in substance, would not suffice to

change Prosperous from a selling agent, if it had been one, to a buying agent.

However, it appears to the Court that the form followed the actual substance, rather than the reverse. Unrebutted testimony indicates that Prosperous at no time had title to any of the merchandise in question. According to the same unrebutted testimony, Prosperous at no time bore a risk of loss. Further, at no time does Prosperous appear to have had the authority to, nor did it, independently purchase or stock merchandise for resale. Thus it appears that Prosperous acted at all times as a *bona fide* buying agent, rather than as a seller, although it was not until the principal in the transaction, Monarch, sent its general counsel to Taiwan to consult with U.S. Customs representatives there as to the proper method of invoicing that the form was changed to comport with the substance of the transaction. Accordingly, the Court holds that all of the attributes of a *bona fide* purchasing agent being present, Prosperous is held to be a buying agent, and the transactions which are the subject of this litigation entered *subsequent to* the change to a proper invoicing procedure in late 1981, should be reliquidated excluding the buying commission from dutiable value.

(Slip Op. 89-92)

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET. AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, DEFENDANT-INTERVENOR

Consolidated Court No. 87-04-00622

[Remanded.]

(Dated June 29, 1989)

Arnold & Porter (*Patrick F.J. Macrory, Spencer S. Griffith* and *Gwyn F. Murray*) for Asociacion Colombiana de Exportadores de Flores, et. al.

Heron, Burchette, Ruckert & Rothwell (*Thomas A. Rothwell, Jr.* and *James M. Lyons*) for Floramerica.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Jeanne E. Davidson*) Civil Division, United States Department of Justice; *Anne W. White,* Office of the Chief Counsel for Import Administration, United States Department of Commerce for defendant.

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.,* and *Jimmie V. Reyna*) for Floral Trade Council of Davis, California.

OPINION

BACKGROUND

RESTANI, *Judge:* Representatives of both the Colombian and the domestic fresh cut flower industry challenge the results of the United States International Trade Administration (ITA) remand determination, wherein ITA amended its previous assessment of dump-

ing rates for some respondents, while leaving other respondents' rates the same. The court's original opinion in this matter ordering remand to ITA is *Asociacion Colombiana de Exportadores de Flores v United States,* 13 CIT ——, 704 F. Supp. 1114 (1989) hereinafter referred to as *Asocolflores I.* That opinion contains the relevant factual information applicable to this case, and almost all of the relevant legal discussion, and should be read in conjunction with this decision. Asocolflores is a Colombian producer and exporter organization, and the lead plaintiff herein. For ease of argument, plaintiffs generally will be referred to as "Asocolflores," "plaintiffs," or "respondents."[1] Where appropriate the court will refer to individual producers or exporters. Floral Trade Council, also a plaintiff, but not referred to as such in these consolidated actions, represents domestic flower interests and is referred to as "FTC." Defendant is the United States of America.

A. *Asocolflores' Challenge to the Rate for Non-Responding Companies*

In its original determination, for companies which were included in its sample for investigation but which did not respond properly to ITA's requests for information, ITA utilized the highest rate of dumping then reflected in the record. This rate was the highest rate for any company whose data was successfully verified. The company with the highest such rate was Uniflor, an exporter. Upon remand, because of a change in methodology approved by the court, *see* discussion Section B *infra,* Uniflor's rate dropped forty percentage points to approximately forty-six percent.[2] *See* Remand Determination at 10–11. This remains the highest rate derived from verified data.

On remand, for these non-responding companies ITA decided to use petitioner's rate as the highest rate of record. *Id.* at 11. Pursuant to statute, 19 U.S.C.A. § 1677e (West Supp. 1989), ITA may use "best information available" (BIA) to assign a dumping rate to such companies if they do not provide ITA with the information it requests. The statute also states that information "submitted in support of the petition" *may* be chosen by ITA as best information available for purposes of a final determination. 19 U.S.C.A. § 1677e(b).

Asocolflores objects to ITA's use of petitioner's rate as BIA on the basis that a verified rate should be used because such a rate by its very nature (i.e. that it is derived from information confirmed by ITA) is "better" information than petitioner's rate, which is based only on data provided by petitioners. *See* Plaintiffs' brief at 3–4. Defendant for its part claims that this is a discretionary matter, and that its newly articulated policy is to use the highest rate available for non-cooperative parties, which in this case is the rate alleged in the petition. ITA further avers that under this policy, parties which

[1] One group of producers, Floramerica and its related Colombian companies, filed a separate brief.

[2] This is not an insignificant rate. Some large producers had *de minimis* or very low rates.

are cooperative but yet cannot substantially comply with ITA's requests, likely would receive rates lower than the petition rate. As this policy is newly articulated there are no court precedents directly on point.[3]

As far as the non-responding parties are concerned they are in a particularly difficult position. Presumably, petitioner's rate was known and any interested respondent could have complied with ITA's request if it had data to establish a lower rate. None of these non-complying respondents or anyone representing them has demonstrated to the court that it should relieve these particular companies of petitioner's rate, if such companies are considered on an individual basis. In fact, it appears that these companies have not participated directly in the administrative or judicial proceedings and are not in a position to object on behalf of themselves. The inquiry, however, does not end here. The rates chosen for these non-complying respondents have application beyond their effects on the non-complying respondents themselves. The BIA rates for non-complying respondents were averaged with other rates from companies comprising ITA's random sample to arrive at an "all other rate." This rate is applied to those companies which were not part of ITA's random sample and which were not asked to participate in ITA's investigation.

In *Asocolflores I,* the court approved inclusion of the BIA rate assigned to non-responding companies (which then was Uniflor's verified rate) in ITA's calculation of an average "all other rate" for those companies that were not part of ITA's sample. At that time the court found ITA did not err in finding Uniflor sufficiently representative so as to be includable in the sample, and that the integrity of the sample required inclusion of rates for non-responding companies that were within the sample. *See Asocolflores I* at 1121, n.11, and 1126. The court finds, however, that under the facts of this case use of petitioner's unverified rate, as part of the averaged rate, simply because it is the "highest" rate, is unreasonable.

One question to be answered here is whether, in the absence of proof of collusion among the parties, ITA should use an unverified rate in the random sample average if a verified rate is available. The court concludes that, in general, too great a burden would be placed upon the agency if proof of collusion were required before petitioner's rate is used in such a situation. But in a case such as this where, for at least three of the four non-responding companies, there seems to be demonstrable proof that the parties were not colluding, use of petitioner's rate seems to be particularly inappropriate. The record indicates that these companies had their own reasons for non-cooperation which were unrelated to the margin level, and the fact-pattern makes collusion nearly an impossibility in this case. The four companies either had business difficulties or no con-

[3]This policy is partially reflected in the administrative determinations in this case, but it was elaborated upon during a post-remand telephone conference among the parties and the court.

tinuing sales of the relevant merchandise, so they may not have found it worth their while to respond.

In other cases, if it is acceptable for ITA to use petitioner's rate for individual companies and a lack of collusion is not so apparent from the fact pattern, the preferred methodology may be to use petitioner's rate in the "all other" average, because it is the rate actually assigned to those companies. In the present case, however, because the verified rates are so much lower than petitioner's rate and because some or all of the non-responding companies appear to have had no motivation to respond, even if their rates would have been far below petitioner's, blanket use of petitioner's rate to calculate the "all other rate" is not appropriate.

On remand, ITA should look at the reasons of record for non-response. If the record indicates that a company is out of business, that it made a one-time sale, or that it had a similar reason unrelated to deposit rates for not responding, a verified rate should be used for purposes of establishing an "all other rate."[4] In other cases, not now before the court, exigencies might or might not permit the use of petitioner's rate where the all other rate is based on a random sample. When dealing with the partial application of quasi-punitive rates to innocent parties, that is, those not part of the sample, further inquiry and explanation is required by ITA before the final average "all other" rate is determined.[5]

B. *Asocolflores Challenge to Uniflor's Material Cost Estimate*

In its original determination ITA used Uniflor's unverified estimate of increases in material costs for the first half of 1986. Uniflor's data was generally verifiable; thus, it was not assigned a BIA rate. To fill in some missing data, the court directed ITA on remand to use averages of verified data, if they revealed higher 1986 costs than estimated by Uniflor. *Asocolflores I* at 1118. The court found this to be a fair approach, as well as being in keeping with ITA's own statement as to its methodology for those companies which had been fully verified, except for minimal items. Plaintiffs now allege that it is unfair of ITA to continue to use the estimate, just because the average of verified costs increases is lower than Uniflor's estimate. The court concludes that this objection is too late. If parties with an interest in Uniflor's rate wished to abandon Uniflor's own estimate of its costs, they should have so advised the court prior to remand. Furthermore, if they had no confidence in the estimate, prior to final determination they should have asked the agency to use an average rate.

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[4]Asocolflores has requested Uniflor's rate, the highest verified rate available. There is nothing in the record of this case to indicate ITA should choose a lower rate at this point in this action.

[5]It is disingenuous of defendant to argue that any producer could have participated without being part of the sample. Small producers cannot participate easily and if many parties had volunteered ITA could not have investigated them. The purpose of the sample was to avoid an unwieldy investigation. In addition, parties not volunteering are not guilty of something which requires punitive action. Parties not part of the sample have a right to expect that ITA's sampling techniques will yield a fair rate related to actual industry behavior, not a rate unduly related to petitioner's claims.

C. *Floramerica's and FTC's Challenges as to Correction of ITA Clerical Errors*

In *Asocolflores I,* the court instructed ITA to correct certain clerical errors noted by the parties regarding Floramerica's dumping margins. *See Asocolflores I* at 1126. Those clerical errors were allegedly: 1) that ITA incorrectly calculated the foreign market value for standard carnations for the months of January 1986 and November 1985, and 2) that the U.S. price for June 1985 had been computed erroneously. The parties are in agreement regarding the error as to computation of U.S. price. Accordingly, ITA's correction of this figure is accepted. With regard to the foreign market value error, Floramerica claims that ITA has now corrected the error for January 1986, but that an error still exists in the November 1985 calculation figure. Plaintiff Floramerica's brief at 3. FTC, for its part, claims that ITA has again miscalculated both the November 1985 and January 1986 values. *See* FTC's Response to Plaintiffs' Comments at 3–4. FTC claims that this mistake arose because ITA took figures from frames 1853 and 1854 (Reel 3 of the Confidential Record) rather than from frames 1889 and 1890. *Id.* at 4.

Defendant claims that the figures noted in frames 1889 and 1890 constitute "preliminary, unrevised figures for the entire fourth quarter, not merely for the month of November 1985." Defendant's Brief at 18–19. Upon review of these documents, it seems clear to the court that the documents alleged by FTC to be correct are in fact only preliminary assessments, as defendant posits. The court therefore affirms ITA's correction of this clerical error. As FTC's allegations regarding the January 1986 figures are based on the same incorrect assumption, that is, that ITA should have used what are now shown to be preliminary figures rather than final calculations, the court also affirms ITA's conclusion as to January 1986.

D. *FTC's Objections to Calculations of Cost of Production*

1. *Timana's Material Costs for 1986*

ITA's method for calculating Timana's material costs for 1986, is affirmed. ITA describes its remand methodology as follows:

> * * * ITA has determined that the most accurate verified material costs figure to use in lieu of the unverified December 1985–May 1986 material costs is the verified average material cost per bunch sold in the June–November 1985 period (one-half the year-end verified material costs for 1985 divided by bunches sold during June–November 1985). Since the time period June–November 1985 is close to December 1985–May 1986, the costs can be expected to be close and can be adjusted for cost increases or decreases between these two periods. Moreover, by using the cost per bunch (*i.e.,* per unit), ITA can multiply the June–November 1985 unit cost figure by the units sold in December 1985–May 1986 to reflect the seasonal differences of higher sales in the first half of the year and to arrive at a

> material cost for December 1985–May 1986 using best information available. C.R. Doc. 95 Frame 1650.
>
> Slip Op. 89–3 also orders that any estimates for 1986 material costs based on 1985 verified costs should reflect the average change in costs from 1985 to 1986. ITA could only find verified material costs for four producers and the earliest period verified was June–November 1985. The change in material costs from June–November 1985 to December 1985–May 1986 for these four producers resulted in an average *decrease* of 7.8 percent. Thus, Timana's material costs of [ ] Colombian pesos per bunch, verified for June–November 1985 and applied to bunches sold in December 1985–May 1986, would be decreased to [ ] Colombian pesos to reflect the average verified decrease in material costs from the period June–November 1985 to the period December 1985–May 1986.

Remand determination at 6–7.[6]

FTC challenged ITA's determination on this point on several grounds. First, FTC challenges ITA's method of arriving at an average verified increase. FTC's and ITA's disagreement on the amount of the average increase reflects different data pools.[7] ITA apparently averaged in data from one company not acceptable to FTC, that is, Flores Esmeralda. FTC, on the other hand, argues that verified data from Flores Generales should have been included in the average.

The court has concluded that none fo the companies whose data was used in calculating the average increase were demonstrated to be so unrepresentative that their data should have been excluded from the calculation of an average increase.[8] FTC has failed to demonstrate that Flores Generales should have been included. The portions of the record cited by FTC and defendant do not demonstrate that Flores Generales' material costs were verified to the extent that the difference between 1985 and 1986 costs should have been included in the average of verified data which the court directed ITA to use. It is undisputed that Flores Generales' material cost data includes some amount of overhead costs. This did not prevent ITA from verifying the more inclusive "cost of manufacturing" fig-

[6]ITA may have used a needlessly complicated method. The more straightforward approaches which occur to the court as satisfying the direction of *Asocolflores I*, however, appear to yield results less favorable to FTC, assuming data from the same companies are used to compute an average increase figure. FTC is the only party objecting to any of ITA's methodologies on this point. The original determination challenged by FTC did not yield a result significantly different from the result achieved by ITA's new method.

[7]This issue was clarified in several conferences among the court and the parties. Letter submissions and briefs, which have been made part of the record of this action, further elucidate this matter.

[8]Flores Esmeralda, which had verified data that was included in the average, was hit by a tornado in 1986. This destroyed part of crops of two flower types. FTC, however, has not demonstrated by citation to evidence of record that Flores Esmeralda's decrease in material costs is largely due to an extraordinary weather event. Other parties also had materials costs which declined on an absolute basis. More importantly, FTC has not demonstrated that on a per unit basis, which was the methodolgy used by ITA to which FTC objected, Flores Esmeralda's material costs change figure was at all unusual.

ITA may have "erred" in excluding La Pampa's data from its average increase calculation. Apparently, from the parties' pre-remand arguments, the court concluded in *Asocolflores I* that La Pampa's material cost data for 1986 was unverified. Defendant now states that they were verified. FTC states that the costs were unverified and has not argued for inclusion of La Pampa's data in the average. In this case, the inclusion or exclusion of the possibly verified data from La Pampa in the average likely had no appreciable effect. For this reason presumably, no request for clarification of the court's statement was made.

ure, but ITA did not verify the entire "cost of materials" subset. FTC argues that because only a relatively small overhead figure is shown to be included, *i.e.*, 5% or less, Flores Generales' material cost figure should be considered verified. The court did not direct ITA to use figures which were nearly verified, only those that were verified.[9] In addition, ITA may have had reason to exclude the separate cost of materials figure as part of the average increase calculation because the increase calculated for Flores Generales was out of line with those derived from more completely verified information. *See* Administrative Record, Doc. No. 96 (reel 3) at frame 1834. Flores Generales started production in 1985, so that its cost allocation methodology may have yielded bizarre results when the data was used to calculate an increase figure. In any case, ITA essentially followed the court's instruction in utilizing fully verified data. ITA also was not required to utilize the highest cost figures available, as FTC argues. *See Asocolflores I* at 1118.

Second, FTC contends that ITA did not follow the court's direction to account for fluctuating costs over the year-long business cycle. The court concludes that ITA has done as much as it must do on this point, utilizing the information available to it, to be fair to each side.[10] If anything, apart from its refusal to use "punitive" data, ITA has leaned toward FTC on this issue. *See supra* note 6.

2. *La Pampa's Material Costs*

As to La Pampa's costs, as indicated *supra*, note 8, if ITA had verified data it should have been used. Defendant has demonstrated, however, that whether averaged data for 1986 increases in costs are used, or whether La Pampa's own data is used, no difference in La Pampa's rate results.[11]

3. *Cull Sales Values as a Deduction to Cost*

Implicit in the court's earlier opinion is its conclusion that there was, at a minimum, conflicting evidence on whether La Pampa "burned" all culls, and that ITA was not required to conclude that all culls were burned by La Pampa. The court directed ITA to use for fully responding companies without verifiable data on this element, the average of verified data on cull sales, as it stated it had in its original investigation. *Asocolflores I* at 1118. ITA complied on remand.

4. *Interest Expenses of Flores Esmeralda*

In its original opinion the court remanded this matter to ITA to explain its policies on offsetting working capital expenses and credits, that is, short term interest expenses and credits. *Asocolflores I*

[9] Had ITA, during its investigation, needed a verified separate cost of materials figure for Flores Generales, it might have been able to obtain the information to "fill in the gaps." In *Asocolflores I* the court did not require ITA to reopen its investigation to complete verification of separate cost of materials data. Rather, the court directed ITA to use the verified data on hand. The court's direction was based on ITA's original explanation of methodology and FTC's arguments.

[10] The December 1984–May 1985 period was not part of the investigation and, therefore, was not a source of verified costs for comparison purposes.

[11] FTC is not pressing this challenge, and as indicated, it believes La Pampa's data is unverified.

at 1119. In addition, the court asked ITA to explain how it arrived at the conclusion that the interest credits were earned on current operating capital, the proffered rationale for allowing the interest credits as an offset to interest expenses arising from current operations. *Id.*

As to the first point, ITA now has altered its position and there is no challenge to the offset methodology used on remand. The sole question remaining is whether ITA's determination that the current interest expenses were totally offset by interest earned on income from current operations is based on substantial evidence.

ITA explained that it examined Flores Esmeralda's books, thereby verifying that short term interest expenses were totally offset by short term interest earned. Remand Determination at 3. ITA then refers to generally accepted accounting principles (GAAP), which provide both that short term interest is treated as part of working capital, and that working capital is normally restricted to current operating cycles. ITA's assumption, of course, is that Flores Esmeralda records, which look like they reflect GAAP, as well as ordinary business practices, actually do so.[12] There is the possibility, raised now by FTC, that because of Colombian economic conditions short term investments were made with other than current operating capital. While ITA may have relied too heavily on the facial appearance of the accounting records in the face of FTC's challenge, the record does not appear to contain data on the viability of short term investment of long-term assets which would allow the court to conclude that ITA erred in not looking beyond the company records. Without contradictory data, the company's records are substantial evidence on which ITA may rely.

The court finds that most of the potential harm to FTC regarding the previous calculation of Flores Esmeralda's interest expense has been eliminated by the change in offset methodology and that FTC has not met its burden of proving lack of substantial evidence in support of, or failure of ITA adequately to investigate the derivation of interest credits.

E. *FTC's Challenge to Exclusion of Certain of Uniflor's Sales as Unrepresentative*

As should be clear from the court's earlier discussion herein, the court viewed the record as supporting exclusion of the Uniflor sales that were made with full expectation of payment, but on which collection could not be made, as unrepresentative of Uniflor's U.S. sales behavior. On remand, ITA altered its position and arrived at the same conclusion as did the court. Remand Determination at 10. ITA has further explained on remand that in a past final determination, in which ITA also was attempting to arrive at an estimated

[12]The court has cited, with approval in various cases, *e.g. Ipsco, Inc.* v. *United States*, 12 CIT ——, 701 F. Supp. 236, 238, note 3 (1988), ITA's policy of using a "firm's expenses as recorded in its financial statements as long as those statements are prepared in accordance with the home country's generally accepted accounts principles (GAAP) and do not significantly distort the firm's financial position or actual costs." (*Citing Carbon Steel Products from Brazil*, 49 Fed. Reg. 28,298, 28,302 (Jan. 25, 1984).

deposit rate in similar circumstances, such sales were excluded. *Id.* at 10–11 (*citing Fabric and Expanded Neoprene Laminate from Taiwan,* 52 Fed. Reg. 37,193, 37,194 (October 5, 1987)). ITA has also explained why it treats such sales differently in annual reviews. *See id.,* (*citing Neoprene Laminate from Japan,* 52 Fed. Reg. 36,295 (September 28, 1987)).[13] The court affirms ITA's exclusion of these sales.

F. *Miscellaneous Issues Not Subject of Remand*

Upon reviewing *Asocolflores I,* the court's earlier determination herein, it appears to the court that the reader may not perceive that Section I.B.4. thereof refers to an adjustment to foreign market value based on constructed value by means of an exporter's sales price offset. *See* 19 C.F.R. § 353.15(c) (1988).

In addition, Asocolflores and Floramerica complain that upon remand the court wrongfully did not instruct ITA to include certain home market selling expenses in its calculation of an exporter's sales price offset for Floramerica. This was not the subject of remand and need not be considered by the court at this time. As this is obviously a very important issue to Floramerica, however, the court has reviewed the matter once more. The court remains convinced that ITA should not be required to recalculate its margins to reflect post-final determination explanations of information, because such explanations were not timely submitted to ITA. It should be noted that there is no dispute as to Floramerica's duty to prove its entitlement to this adjustment. ITA decided and the court affirmed that Floramerica did not meet this burden timely.

Among other things, Floramerica seems to argue that because this issue will effect whether Floramerica receives an operative rate or a *de minimis* rate, the court should order ITA to "correct"[14] this selling expense calculation. To rule for Floramerica on such a basis alone the court must be willing to say that parties to proceedings are not required to give ITA timely, clear and accurate information, because if a party's mistake results in an important change in rates, ITA will be compelled to recalculate the rates after final determination.

Congress has required that estimated deposit rates in original proceedings be calculated within very short time periods. One cannot simply throw data at ITA without clear explanations, or provide it with misleading explanations. Accordingly, ITA did not err in declining to recalculate, but rather, apparently made a policy decision in favor of compelling accuracy and timely presentation of data, even if it means here that both ITA and the party involved will be forced to spend time in an administrative review of the rate.

Although the parties did not focus on the extent of the court's equitable powers in these actions, it appears to the court that despite ITA's rational behavior, the court may have discretion, particularly

[13]The practice with regard to annual reviews is not before the court.

[14]The court has referred to ITA's "error," only because post-final determination information reveals that an "error" probably occurred.

where it is remanding other matters, to order ITA to recalculate in the interest of justice and to save judicial, as well as administrative, resources. The court has declined here to exercise any such discretion it may have. This is a particularly complicated case involving several interrelated investigations, numerous producers and novel methodologies. Due to the size and complexity of the case the court believes justice is better served by keeping remand issues as narrow as is permissible and by restricting all parties to arguments based on the presentation of their cases before final determination, except on remand issues.[15] If the court orders remand in this situation where ITA did not err in its assessment of the data, as presented in the record, and where it did not abuse its discretion in declining to recalculate, other parties, particularly those opposed to Floramerica's position, might rightly ask to raise other issues not timely addressed or to present new evidence or arguments on behalf of a position. One only need read *Asocolflores I* and the previous portions of this opinion for indications that this is not mere speculation. Accordingly, in the interest of fulfilling Congress' desire for expedition, the court adheres to its previous opinion on this issue.

ITA has twenty days to file its remand results on the one issue remaining. *See supra* Section A. As this is not an accounting issue, the court expects compliance with this deadline unless extraordinary reasons are presented as to why it cannot be met.

(Slip Op. 89–93)

BORLEM S.A.-EMPREEDIMENTOS INDUSTRIAIS AND FNV-VEICULOS E EQUIPAMENTOS S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND THE BUDD CO., DEFENDANT-INTERVENOR

Court No. 87–06–00693

[Remanded to ITC.]

(Dated June 29, 1989)

Willkie, Farr & Gallagher, (*William H. Barringer, Arthur J. Lafave, III* and *Daniel L. Porter*) for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel United States International Trade Commission (*Frances Marshall*) for defendants.

Barnes, Richardson & Colburn, (*James H. Lundquist, Matthew T. McGrath* and *Peter A. Martin*) for defendant-intervenor.

[15]To put this matter in a broader perspective one may wish to review the court's decisions in the related cases in which the court has upheld equally strict standards of accuracy and timely presentation of arguments and data, to the detriment of FTC, a party which opposes Floramerica in this action. *See Floral Trade Council of Davis, Calif.* v. *United States,* 12 CIT ——, 699 F. Supp. 309 (1988); *Floral Trade Council of Davis, Calif.* v. *United States,* 12 CIT ——, 704 F. Supp. 233 (1988); *Floral Trade Council of Davis, Calif.* v. *United States.* 12 CIT ——, 704 F. Supp. 241 (1988); *Floral Trade Council of Davis, Calif.* v. *United States,* 13 CIT ——, 707 F. Supp. 1343 (1989). While these decisions did not benefit Floramerica directly, it appears to the court that what Floramerica seeks here is application of a different standard than that which the court has applied to all other parties in these related cases.

Opinion and Order

Carman, *Judge:* Plaintiffs, Borlem S.A.-Empreedimentos Industriais (Borlem) and FNV-Veiculos E Equipamentos S.A. (FNV), move pursuant to Rule 56.1 of this Court for partial judgment on Count I of the Complaint requesting an immediate remand to the United States International Trade Commission (ITC) to reconsider its affirmative threat of injury determination in light of the International Trade Administration's (ITA) *Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels From Brazil,* 53 Fed. Reg. 34,566 (September 7, 1988) (Commerce's Second-Amended Final Determination). Plaintiffs request that this Court effectively set aside the remand determination of the ITC declining to reconsider its determination in *Tubeless Steel Disc Wheels From Brazil,* USITC Pub. No. 1971, Inv. No. 731-TA-335 (Final) (April 1987), 52 Fed. Reg. 17,487 (May 8, 1987). Defendants and defendant-intervenor oppose the motion.

The question presented to the Court is whether or not the ITC, upon a remand from this Court, has the power to reconsider its determination. This Court holds that the ITC has such power and that the exercise of such power is discretionary. Hence, the next question is whether or not the ITC should, in the exercise of its discretion, reconsider its determination that an industry in the United States is threatened with material injury by reason of less than fair value (LTFV) imports from Brazil of tubeless steel disc wheels (TSDWs) in light of Commerce's Second-Amended Final Determination. If the ITC in its discretion determines that it should reconsider its determination, then it is directed to complete such reconsideration. If the ITC determines that it should not reconsider its determination, it is directed to set forth the reasons why it should not reconsider its determination.

Facts

The facts as set out in *Borlem, S.A. Empreedimentos Industriais* v. *United States,* 13 CIT ——, Slip Op. 89-36 (March 22, 1989) (*Borlem I*), are substantially repeated for convenience.

On May 23, 1986, the Budd Company filed an antidumping petition with Commerce and the Commission on behalf of the United States industry producing TSDWs. The petition alleged that Brazilian manufacturers were selling TSDWs in the United States at LTFV within the meaning of section 731 *et seq.*, of the Tariff Act of 1930 as amended, (19 U.S.C. § 1673 *et seq.* and that an industry in the United States was materially injured or threatened with material injury by reason of imports of this merchandise. At all relevant times, there were only two Brazilian exporters of tubeless steel disc wheels: Borlem and FNV.

On March 13, 1987, Commerce issued an affirmative final antidumping duty determination for TSDWs from Brazil. *Final Determination of Sales at Less Than Fair Value: Tubeless Steel Disc Wheels From Brazil,* 52 Fed. Reg. 8,947 (March 20, 1987). Commerce found that the LTFV dumping margin for Borlem was 15.25% *ad valorem,* and for FNV, 19.93% *ad valorem.* The Commission subsequently determined that an industry in the United States was threatened with material injury by reason of imports of the subject merchandise from Brazil. *Tubeless Steel Disc Wheels From Brazil,* USITC Pub. No. 1971 (Final).

Following issuance of the final injury determination, Commerce issued an antidumping duty order together with an amendment to its final LTFV determination correcting clerical errors. *Amendment to Final Determination of Sales at Less Than Fair Value; Tubeless Steel Disc Wheels From Brazil, and Antidumping Duty Order,* 52 Fed. Reg. 19,903 (May 28, 1987).

On May 28, 1987, Borlem and FNV commenced two actions, one challenging the final LTFV determination by Commerce (Court No. 87–06–00692) and the other challenging the final injury determination by the Commission (the instant case). On June 15, 1988, this Court at the request of the ITA remanded the final LTFV determination and antidumping duty order to Commerce with instructions to recalculate the dumping margin and to correct all clerical, methodological and transcription errors. *Borlem, S.A. Empreedimentos Industriais* v. *United States,* 12 CIT ——, Slip Op. 88–77 (June 15, 1988).

The remand resulted in the publication on September 7, 1988, of a second-amended final LTFV determination and amended antidumping duty order. 53 Fed. Reg. 34,566. The second-amended final LTFV determination found Borlem to have a weighted-average dumping margin of 10.84% and FNV, a margin of 0.04%. Commerce deemed FNV's margin to be *de minimis* and excluded this company from its amended affirmative determination. Based on the amended determination, Commerce directed the United States Customs Service to terminate suspension of liquidation for all entries of TSDWs from Brazil by FNV. 53 Fed. Reg. at 34,569.

On September 22, 1988, the Budd Company filed a summons and complaint with the Court contesting the second amended final LTFV determination and antidumping order. *See The Budd Company* v. *United States,* Court No. 88–09–00725. On October 4, 1988, Borlem filed a summons and complaint contesting different aspects of the same determination. *See Borlem S.A. Empreedimentos Industriais* v. *United States,* Court No. 88–10–00760. These actions related to the Commerce determinations.

On March 22, 1989, in the instant case, this Court, at the request of the ITC after oral argument, invoked the doctrine of primary jurisdiction and pursuant to its power to remand under the Customs Courts Act of 1980, 28 U.S.C. § 2643(c)(1) (1982), returned the mat-

ter to the ITC. *See Borlem I.* The Court instructed the ITC to consider a hybrid legal and policy question in accordance with the doctrine of primary jurisdiction in light of the expertise of the ITC in the administration of the antidumping laws. The ITC was directed to decide whether it should reconsider its injury determination and further, should it determine to reconsider, to proceed with such reconsideration. The Court said:

> By sending the matter back to the ITC for its views, the Court [was] neither extending nor abdicating its jurisdiction. This Court is merely waiting until the agency has had an opportunity to formulate its position. Upon completion of the remand proceedings, this Court will review all the ITC's actions to determine if they are based upon substantial evidence and are in accordance with law.

Borlem I, 13 CIT at ——, Slip Op. 89-36 at 13.

On April 11, 1989 the ITC determined that there was no explicit authority for the ITC to undertake reconsideration of its decision except for the process under section 751 of the Act, 19 U.S.C. § 1675. *Tubeless Steel Disc Wheels From Brazil,* USITC Pub. No. 2179 (Views on Remand in Inv. No. 731-TA-355) at 5-6. The ITC reported to this Court its determination not to reconsider its final affirmative threat of a material injury determination in *Tubeless Steel Disc Wheels From Brazil,* USITC Pub. No. 1971 (Final).

The ITC Determination

The ITC in its report to this Court of its determination indicated that it should not reconsider its final affirmative threat of material injury determination in *Tubeless Steel Disc Wheels From Brazil,* USITC Pub. No. 1971 (Final), in light of the Department of Commerce's Second-Amended Final Determination, 53 Fed. Reg. 34,566. The ITC indicated it did not have the power to reconsider.

The majority said:

> We conclude that Congress did not intend for such matters to be the basis for a reconsideration by the Commission. We base this conclusion on the relevant statutes, taking into consideration the nature and structure of the statutory process for the conduct of antidumping investigations, and the interests of finality and equity, as well as the consequences for the efficient administration of antidumping investigations if matters such as these are remanded to the Commission.

USITC Pub. No. 2179 at 3.

The ITC majority found no explicit statutory authority for the ITC to reconsider its decisions except for an administrative review under section 751 of the Tariff Act of 1930.[1] The ITC citing general-

[1]Section 751 states in pertinent part:

§ 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

Continued

ly 19 U.S.C. §§ 1671a(c), 1673a(c), 1671b(a), 1671b(b), 1673b(a), 1673b(b), 1671d(a), 1671d(b), 1673d(a), 1673d(b) indicated that Congress created a complex system for the administration of the antidumping and countervailing duty laws that requires *speed* in the making of determinations. *Id.* at 6–7.

The ITC indicated that the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1333, 102 Stat. 1107, 1209, (1988) (the 1988 Act) authorizes Commerce to reconsider and revise its findings to correct certain ministerial errors. The majority pointed out:

> Congress's 1988 authorization of Commerce to undertake reconsideration to correct ministerial errors in its determination is particularly significant. That Congress granted the power to reconsider its determination outside the ordinary time frame for its determinations, but did not provide equivalent authority to the Commission, should be construed as prohibiting the assumption of such a power by the Commission.
>
> We note that the disparate treatment of Commission and Commerce determinations with regard to reconsideration in the 1988 Act is not the first instance where Congress provided different treatment for the two agencies' determinations. For example, * * * there is an annual review of the Commerce determination, which is required if requested. Commission review under section 751 is discretionary and is warranted only under changed circumstances and, if sought within the first 24

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

* * * * * * *

(b) Review upon information or request

(1) In general

Whenever the administering authority or the Commission receives information concerning, or a request for the review of, an agreement accepted under section 1671c of this title (other than a quantitative restriction agreement described in subsection (a)(2) or (c)(3)) or 1673c of this title (other than a quantitative restriction agreement described in subsection (a)(2)) or an affirmative determination made under section 1671c(h)(2), 1671d(a), 1671d(b), 1673c(h)(2), 1673d(a), 1673d(b), 1676a(a)(1), or 1676a(a)(2) of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. In reviewing its determination under section 1671c(h)(2) or 1673c(h)(2) of this title, the Commission shall consider whether, in the light of changed circumstances, an agreement accepted under section 1671c(c) or 1673c(c) of this title continues to eliminate completely the injurious effects of imports of the merchandise. During an investigation by the Commission, the party seeking revocation of an antidumping or countervailing duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping or countervailing duty order.

(2) Limitation on period for review

In the absence of good cause shown—

(A) the Commission may not review a determination under section 1671d(b) or 1673d(b) of this title, and

(B) the administering authority may not review a determination under section 1671d(a) or 1673d(a) of this title, or the suspension of an investigation suspended under section 1671c or 1673c of this title,

less than 24 months after the date of publication of notice of that determination or suspension.

* * * * * * *

19 U.S.C. § 1675 (1982 & Supp. V 1987).

> months after the determination, only for good cause. Further, while the Commerce determination is based on the same statutory standard as the original determination, the standard for the Commission's determination in review cases is distinct from the standard used in the original investigation.[21]
>
> [21] *Compare* 19 USC 1675(a) *with* 19 USC 1675(b). While the initial determination of the Commission is whether the unfair imports caused or threatened material injury, in section 751 investigation [sic] the specific question is whether revocation of the order would lead to material injury.

USITC Pub. No. 2179 at 7–9 (footnotes omitted).

The ITC observed that one of the primary concerns of Congress was to speed up the process by which investigations are conducted and duties imposed. *Id.* at 10. Congress, according to the ITC, did not intend for reconsideration in the circumstances of the present case.

The ITC underlined its argument that Congress wanted dumping and countervailing duty proceedings to be handled speedily by pointing out that Congress showed this concern by drastically reducing the time allowed for investigation even though it was clear investigations and records would necessarily be less than complete. The ITC majority said:

> By granting the Commission authority to make determinations on "the best information available"[25] and by limiting review "to the record,"[26] Congress recognized that the short time limits involve a trade off in which completing investigations promptly and efficiently are of highest priority.
>
> Thus, looking at the structure of antidumping and countervailing duty proceedings, we conclude that there is no express grant of authority for the Commission to reconsider its determinations in the present situation. Such reconsideration, we conclude, would be actually inconsistent with the statute and the structure of antidumping and countervailing duty investigations.
>
> [25] 2519 U.S.C. § 1677e(b).
>
> [26] Congress provided that review should be on the basis of whether the final determination was supported by substantial evidence *on the record*, that is, on the basis of the facts that were before the agency at the time it made its determination. 19 U.S.C. § 1516a(b)(1)(B). Congress thus precluded the extension of the investigation by discovery or factfinding as to new information during appellate review.

Id. at 10–11 (emphasis in original).

Discussion

The standard of review for final injury determinations in antidumping cases is whether, on the basis of the administrative record before the Court, the action of the agency is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). This Court must give substantial weight to the agency's interpretation of the statute subject to its administration. *American Lamb Co.* v. *United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). Furthermore "[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong

* * *." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). Nevertheless, this Court has significant powers in law and equity to remand to the administrative agency where proper circumstances require. Explicit authority to remand is given to this Court in the Customs Courts Act of 1980. 28 U.S.C. § 2643(c)(1).[2]

This Court stated in *Borlem I,* "Congress was clear in its purpose: 'In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court.' " This Court observed " '[j]udicial authority supports granting a request for remand if it fosters and promotes fundamental fairness.' " 13 CIT at ——, Slip Op. 89–36 at 6–7 (*citing Alhambra Foundry Co., Ltd.* v. *United States,* 12 CIT ——, 685 F. Supp. 1252, 1262 (1988); *ILWU Local 142* v. *Donovan,* 12 CIT ——, 678 F. Supp. 307 (1988); *PPG Industries, Inc.* v. *United States,* 13 CIT ——, 708 F. Supp. 1327 (1989).

Although limited in its review to the administrative record, *see* 19 U.S.C. § 1516a(b)(1)(B), this Court must take judicial notice of decisions of federal executive departments when requested by a party. *See,* Fed. R. Evid. 201; *Caha* v. *United States,* 152 U.S. 211, 221–22 (1894); 10 Moore's Federal Practice § 201.02(1) (2nd Ed. 1988 & Supp. 1989). Since plaintiff requested this Court to take judicial notice of the Second-Amended Determination by Commerce, this Court must and does take judicial notice of that determination. The Second-Amended Determination terminated suspension of liquidation for all entries of TSDWs from Brazil by FNV. In the Second-Amended Determination Commerce indicated the reason for the suspension was its finding of *de minimis* dumping margins as to FNV. 53 Fed. Reg. at 34,569.

Hence it seems clear that had the ITC known at the time it made its affirmative threat of injury determination that FNV, the major manufacturer of TSDWs imported from Brazil, was not dumping or had *de minimis* dumping margins, there is a very strong possibility the ITC would have found no injury. In other words, it would appear the ITC made its finding of injury based upon material and significant inaccurate facts.

The ITC majority in deciding not to reconsider its affirmative determination indicated it was apprehensive about several potential administrative problems. It expressed concern about the cost to private parties as well as added burdens upon government resources if a case were subject to reconsideration. USITC Pub. No. 2179 at 15. The ITC majority said:

> We do not want the prospect of court-ordered reconsideration to chill the filing of petitions, especially by small businesses with limited resources.

[2]28 U.S.C. § 2643(c)(1) provides:

> Except as provided in paragraphs (2), (3), and (4) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

> * * * Although we cannot predict the frequency with which Commerce decisions will result in court-mandated revisions, we would expect such revisions to result in some requests for court-ordered Commission reconsideration.
>
> The added burden will be exacerbated in cases where the Commission is required to obtain *new* evidence as part of the reconsideration.

Id. at 15–16 (emphasis in original, footnotes omitted).

The ITC majority expressed reluctance to engage in critical analysis of its sister agency's decisions that parties might demand should reconsideration be a possibility. The ITC pointed out that second guessing a determination by the ITA would tend to foster poor relations between the two agencies which must cooperate for the bifurcated system to operate effectively. *Id.* at 17–18.

Concluding, the ITC majority said:

> We have examined Borlem's arguments carefully and appreciate its perception that the system operates to Borlem's disadvantage if the Commission does not reconsider. Nevertheless, * * * we believe that the procedure for rendering antidumping determinations can operate effectively, and as Congress designed it, only if the Commission refrains from creating an exception to the finality of its determinations in order to remedy the exigencies of Borlem's case. Congress opted for expedition and finality in the statutory scheme, and it is our observation that the ability of firms in general to plan and effectively conduct their business, particularly in the area of international trade, depends in no small measure on the stability of administrative processes. Any adjustment in the statutory scheme to provide recourse for those in Borlem's situation is in our judgment properly for Congress and not for this agency or the courts.

Id. at 18–19.[3]

Borlem, while conceding there is no explicit administrative procedure in the Act for the ITC to review its final injury determination other than a section 751 review, contends that federal courts have recognized the inherent power of administrative agencies to reconsider where the agency's decision has been based upon erroneous facts or to correct errors of procedure or substance, citing *Alberta Gas Chemicals, Ltd.* v. *Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981).

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[3]The ITC majority at footnote 18 of its determination said:

> In Pipes and Tubes of Iron and Steel from Japan, Inv. No. 731–TA–15 (Preliminary), the Commission asserted the authority to reconsider a decision because of a clear, although unintended, mistake in its record. 45 *Fed. Reg.* 42898 (June 25, 1980). The Court found that assertion of such power by the Commission was contrary to the "legislative policy manifest in the governing statute." *Babcock and Wilcox* v. *United States*, 521 F. Supp. 479, 486 (CIT 1981). *Babcock and Wilcox* was subsequently vacated as moot and thus is not precedential. *Nevertheless, we find the logic compelling.*

USITC Pub. No. 2179 at 8 (emphasis added).

While this Court is in ready agreement that an administrative agency can have no more powers than those which have been delegated to it, necessarily with those delegated powers certain implied powers are derived. Correction of mistakes, depending upon when they are discovered and when they are corrected, would seem readily to fall within such implied powers.

In any event, since this Court is relying upon the express powers Congress granted to it by its remand authority as set forth elsewhere in this opinion, there is no need to rely upon the use of such implied powers in this case.

The ITC apparently has recognized a fundamental power to reconsider its determinations. 19 CFR § 207.46 (1988) provides: "Nothing in § 207.45 [the regulation implementing section 751 of the Act] shall limit the *inherent* authority of the Commission to issue an appropriate modification, clarification, or correction of a determination *within a reasonable* time of its issuance." (Emphasis added).

In *Greene County Planning Bd.* v. *Fed. Power Commission,* 559 F.2d 1227, 1233 (2d Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978), Circuit Judge Lombard said:

> While an agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions, *especially where broad public interests are at stake,* see *Hudson River Fishermen's Ass'n* v. *FPC,* 498 F.2d 827, 833 (2d Cir. 1974), *an agency's refusal to reopen the record cannot be deemed arbitrary and capricious unless the new evidence offered, if true, would clearly mandate a change in result.*

(Emphasis added).

This rationale has ample support. *See, e.g., Alberta Gas Chemicals, Ltd.,* 650 F.2d 9; *Mobil Oil* v. *ICC,* 685 F.2d 624 (D.C. Cir. 1982); *Duval Corp.* v. *Donovan,* 650 F.2d 1051 (9th Cir. 1981); *Nance* v. *Environmental Protection Agency,* 645 F.2d 701 (9th Cir.), *cert. denied sub. nom. Crow Tribe of Indians, Montana* v. *Environmental Protection Agency,* 454 U.S. 1081 (1981). In any event, this Court need not rely upon the inherent powers of the ITC to reconsider its decision since, as provided further in this opinion, corrections can take place under the authority of a remand from this Court.

Borlem cites *Badger-Powhatan* v. *United States,* 10 CIT 241, 633 F. Supp. 1364 (1986); *The Timken Co.* v. *United States,* 7 CIT 319 (1984); *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670 (1984); and *Smith Corona Corp.* v. *United States,* 11 CIT ——, 678 F. Supp. 285 (1987) as examples of this Court's use of its remand authority to order the correction of legal errors in the context of judicial review.

Defendants point out, nevertheless, that agency expertise in interpreting the laws the agency administers ought to be sustained as long as the statutory interpretation is reasonable, citing *PPG Industries, Inc.* v. *United States,* 13 CIT ——, Slip Op. 89–45 (April 7, 1989), *appeal docketed,* No. 89–1520 (Fed. Cir. June 1, 1989); *United States* v. *Zenith Radio Corp.,* 64 CCPA 130, 562 F.2d 1209 (1977), *aff'd,* 437 U.S. 443 (1978) and *American Lamb Co.,* 4 Fed. Cir. (T) 47, 785 F.2d 994. Memorandum of United States International Trade Commission in Response to Plaintiffs' Motion for Partial Judgment on Count I of the Complaint at 12.

The defendants argue further citing *Chevron USA* v. Natural Resources Defense Council, 467 U.S. 837 (1984), that where Congressional intent is clearly discernible, agencies, as well as courts, must give that intent effect. Defendants quote *Chevron* which stated: "Rather, if the statute is silent or ambiguous with respect to the

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted).

This Court, mindful of its obligation to give substantial weight to the agency's interpretation of the statutes it administers, cannot defer to an interpretation where there are compelling indications that the interpretation is incorrect.

This Court holds that the interpretation by the ITC that it does not have the power on a remand from this Court to reconsider its final determination is unreasonable and not a permissible construction of the statute. While the ITC majority properly pointed out that Congress wanted dumping and countervailing duty cases to be handled speedily and was willing to accept as a trade off for speed less than complete records, there has been no showing that Congress had no concern for accuracy. The mere fact that Congress was willing to grant the ITC authority to make determinations on the "best information" available, should not be interpreted as authorizing proceedings that are so flawed with inaccurate facts that different results would obtain if accurate facts were used. Congress although providing no explicit administrative procedure in the Act for the ITC to review its final determinations other than section 751 reviews did, nevertheless, make specific provisions for judicial review. *See* 19 U.S.C. § 1516a.

Notwithstanding a lack of explicit statutory authority in the Act for ITC reconsideration of final agency determinations, other than section 751 reviews, there is no doubt that remands from this Court provide a vehicle for reconsideration by the ITC and the ITA. *See* 28 U.S.C. § 2643(c)(1).

The broad and sweeping remand authority given to this Court by the Customs Courts Act of 1980, 28 U.S.C. § 2643(c)(1), demonstrates the concern of Congress for accuracy in these very important cases. It seems clear in the instant case that the fact the FNV, the major manufacturer of TSDWs imported from Brazil, was not dumping or was dumping with *de minimis* margins is of such substantial significance that the ITC might well have changed its determination and determined there was no material injury or threat of material injury. *See* Confidential Administrative Record Document No. 14 of List 2 (Final Staff Report to the Commission), at A–51; USITC Pub. No. 2179 at 22 (Dissent of Commissioner Cass).

Furthermore, although one might argue that corrections can wait until the 751 review since the dumping order merely requires duty deposits and does not assess the duties to be paid until the time of the 751 review, *see Cabot Corp.* v. *United States,* 9 CIT 489, 620 F. Supp. 722 (1985), *appeal dismissed,* 4 Fed. Cir. (T) 80, 788 F.2d 1539 (1986), *vacated in part,* (CIT order of Nov. 20, 1986); *Alhambra Foundry Co., Ltd.* v. *United States,* 10 CIT 330, 635 F. Supp. 1475 (1986), such corrections may not be so easily obtained. The majority of the ITC has pointed out that the standard it must use at the 751

review is different from that which is employed at its original determination. USITC Pub. No. 2179 at 7–8. The inaccurate information, *i.e.* the non-dumping status of FNV, may not be considered relevant by the administrative agencies at the 751 review.

The majority expressed many concerns of administrative problems that might occur at the prospect of court ordered reconsideration. This Court is not unmindful of these administrative problems or of its obligation to give substantial weight to the agency interpretation of the statutes subject to its administration. *See American Lamb Co.,* 4 Fed. Cir. (T) at 54, 785 F.2d at 1001.

The Court nevertheless observes that the facts of this case are unusual.

The dissenting views of Vice Chairman Ronald A. Cass are helpful.

> Reconsideration of Commission decisions should not be undertaken lightly. The compressed statutory time-frame established for Title VII antidumping and countervailing duty investigations clearly suggests that Congress wished to minimize the uncertainty and disruption to international trade that necessarily attends such investigations. Consistent with that objective, it is important that there be some measure of finality to our investigations. When we leave open the possibility that our determinations will be revisited, the principle of finality is to some extent compromised.
>
> Nevertheless, as Congress has recognized in providing, without any time limits, for judicial review of Title VII administrative determinations, there are circumstances when such compromise is necessary. The real question before us is whether this case presents such circumstances. I believe that it does, but I emphasize that the circumstances justifying reexamination here are quite exceptional.
>
> The error that has apparently been made, and rectified, by the Department of Commerce is by no means a trivial one. Because we have not had occasion actually to reconsider the Commission's earlier determination, it is not possible to say whether our disposition of this investigation would have been different if this error had not been made. However, the record now before us suggests at least *a very strong possibility that the error was outcome determinative.*

USITC Pub. No. 2179 at 21–22 (emphasis added, footnote omitted).

This Court observes that while the majority of the ITC expressed numerous policy concerns why it should not reconsider its injury determination, it seemed to decline reconsideration primarily because it thought it lacked the power on a remand from this Court to do so.

Conclusion

This Court holds the ITC has the authority and the power to reconsider a final determination when directed by this Court to do so pursuant to this Court's remand authority. This Court directs fur-

ther that the ITC shall determine if, in the exercise of its discretion, it should reconsider. If the ITC determines that it should reconsider its final affirmative determination, then it is directed to complete such reconsideration. If the ITC determines that it should not reconsider its determination, it is directed to set forth the reasons why it should not reconsider its determination.[4]

(Slip Op. 89–94)

BOMONT INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI CHEMICAL INDUSTRY CO., LTD., INTERVENOR-DEFENDANT

Court No. 86–05–00557

OPINION AND ORDER

[Plaintiff's motion for judgment on agency record granted in part and denied in part; remanded to International Trade Administration.]

(Decided June 30, 1989)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Charles A. St. Charles, Mary Tuck Staley* and *John M. Breen*) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sheila N. Ziff*); *Douglas A. Riggs*, General Counsel, *M. Jean Anderson*, Chief Counsel for International Trade, and *William Perry*, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel; for the defendant.

Barnes, Richardson & Colburn (*James S. O'Kelley, Leonard Lehman* and *Matthew T. McGrath*) for the intervenor-defendant.

AQUILINO, *Judge:* The plaintiff complains at length about the performance of the International Trade Administration, U.S. Department of Commerce ("ITA") in resolving a proceeding *sub nom. Antidumping; Nylon Impression Fabric From Japan; Final Determination of Sales at Not Less Than Fair Value,* 51 Fed. Reg. 15,816 (April 28, 1986), wherein the agency determined that imports of the indicated merchandise by or for the account of Shirasaki Tape Co., Ltd. and Asahi Chemical Industry Company, Ltd. were not being, or likely to be, sold in the United States at less than fair value.

In 1977, the Treasury Department had determined that, with the exception of the merchandise supplied by Shirasaki and by Asahi, impression fabric of man-made fiber from Japan was being sold at

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[4]In the dissenting views of Vice Chairman Cass, he stated:

> I dissent from the Commission's determination * * * Without having seen the opinion that has been submitted to the Court by my colleagues,[1] I cannot comment meaningfully on the reasons why my resolution of this question differs from that of the Commission majority. With that limitation in mind, I will * * * explain * * * why * * * we should reconsider * * *.
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> [1]In this proceeding, as in other Title VII investigations, certain Commissioners among the Commission majority have declined to share their written views with dissenting Commissioners.

USITC Pub. No. 2179 at 21.

This Court, especially in light of its obligation to give substantial weight to the agency's interpretation of the statutes subject to its administration, expresses great frustration with this practice. While noting it makes it more difficult to perform its function of judicial review, this Court will nevertheless continue to perform its duty. This Court expresses the hope that this practice will come to an end.

less than fair value within the meaning of the Antidumping Act of 1921, as amended.[1] The weighted-average margin on Asahi's sales was considered *de minimis*, whereas Shirasaki was excluded from the finding of dumping[2] because the weighted-average margin on its sales was considered to be "minimal" in relation to their total volume, and "formal assurances" of no future sales at less than fair value were received. *See* 42 Fed. Reg. at 65,345.

Bomont Industries and a domestic competitor filed a petition with the ITA pursuant to the Trade Agreements Act of 1979, as amended by the Trade and Tariff Act of 1984, alleging dumping by Asahi and Shirasaki. The agency concluded that the petition contained sufficient grounds upon which to initiate an investigation of merchandise by or for the accounts of those two enterprises. After the International Trade Commission determined that there was reasonable indication that imports of nylon impression fabric from Japan were materially injuring the U.S. industry[3], the ITA investigated the period January 1 through June 30, 1985 and reached the final negative determination cited above.

Plaintiff's complaint pleads some 18 causes of action. Its motion for judgment on the agency record pursuant to CIT Rule 56.1 is spelled out in a 142-page brief and 61-page reply brief encompassing five fundamental claims, to wit: (1) the ITA's decision not to expand the period of investigation was unsupported by substantial evidence and contrary to law; (2) the agency's failure to investigate sales of Japanese impression fabric transshipped through West Germany was an abuse of discretion and unsupported by substantial evidence of record; (3) the ITA failed to verify transfer prices between related parties and based its final determination of foreign-market value on related-party or fictitious prices contrary to the statute, regulations and agency precedent; (4) the ITA's determination was based on unverified and questionable information submitted by Shirasaki and thus was unsupported by substantial evidence; and (5) the agency abused its discretion by allowing Asahi and Shirasaki to submit public versions of their questionnaire responses that did not comply with the law.

Jurisdiction is based on subparagraphs (A)(i)(I) and (B)(ii) of 19 U.S.C. § 1516a(a)(2) (1984) and upon 28 U.S.C. § 1581(c).

I

In response to plaintiff's primary point, the defendant states that

> Commerce has consistently taken the position that its normal practice is to conduct a six-month investigation and that it will not expand the investigation period without good cause.[4]

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[1] *See Impression Fabric of Man-Made Fiber from Japan; Determination of Sales at Less Than Fair Value; Exclusion From and Final Discontinuance of Antidumping Investigation*, 42 Fed. Reg. 65,344 (Dec. 30, 1977).

[2] *See* 43 Fed. Reg. 22,344 (May 25, 1978).

[3] *See* 50 Fed. Reg. 31,053 (July 25, 1985).

[4] Defendant's Memorandum, p. 32.

The petitioners recognized this fact, as revealed, for example, in experienced counsel's letter requesting a broader investigative period although admitting that an investigative period of January 1 through June 30, 1985 would conform with normal agency practice.[5] Nevertheless, the plaintiff in its present papers, as well as in prior proceedings in open court, has sought to show unfair treatment, "so fundamentally prejudicial as to constitute a deprivation of due process"[6], by the ITA.

Of course, in an action such as this, challenging a final negative determination, the standard of review prescribed in the 1979 act, as amended, is whether the agency decision is unsupported by substantial evidence on the record, or otherwise not in accordance with law. The standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), for holding agency action unlawful as arbitrary, capricious and an abuse of discretion does not apply here. *Compare* 19 U.S.C. § 1516a(b)(1)(B) *with id.*, § 1516a(b)(1)(A). Nevertheless, the plaintiff correctly argues that parties are entitled to some degree of due process from agencies, consonant with the rights affected and type of proceeding involved, citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and *Goldberg* v. *Kelly*, 397 U.S. 254, 267–71 (1970).

The petition below was filed on June 10, 1985, which led to the ITA's conducting an investigation for the period January 1 through June 30th of that year in accordance with 19 C.F.R. § 353.38(a), which provides, in part:

> * * * Ordinarily the Secretary will require a foreign manufacturer, producer, or exporter subject to the investigation to submit pricing information covering a period of at least 150 days prior to, and 30 days after, the first day of the month during which the petition was received in acceptable form.

This regulation also states that the Secretary

> may, however, require the submission of pricing information for such other period as he deems necessary and he may also require the submission of pricing information on a current basis during the course of an investigation.

At the outset of the investigation, in commenting on the agency's draft questionnaire, the petitioners requested that the ITA "obtain information for a longer period of time—specifically 12 months, July 1, 1984 through June 30, 1985." R. Doc 10 at 2. In support of this position, they referred to

> their belief that the Japanese producers and exporters have taken temporary steps to minimize the dumping taking place. As recognized * * * in the injury investigation before the International Trade Commission, imports of the product under the investigation have decreased in the first quarter of 1985 * * *.

[5] Record Document ("R. Doc") 10 at 1.

[6] Plaintiff's Brief, p. 71 (quoting *Lois Jeans & Jackets, U.S.A., Inc.* v. *United States*, 5 CIT 238, 243, 566 F. Supp. 1523, 1528 (1983)).

> This recent decline has occurred even though imports from 1981 through 1984 increased steadily. The decline in imports in the first quarter of 1985 supports petitioners' belief that the Japanese producers were aware of the impending filing of an antidumping petition, and so changed some of their practices. Thus, the agency should investigate an entire year to ensure that the information provided is truly representative of Japanese sales of nylon impression fabric. R. Doc 17 at 2.

Thereafter, during the course of the investigation, the petitioners called upon the ITA to "require current price information [for] the period August 24, 1985 through February 24, 1986 (or September 1, 1985 through February 28, 1986, whichever is easier administratively)." R. Docs 137, 139. In other words, a period past the time actually covered in accordance with agency practice and the above regulation should be investigated. The ITA disagreed.

It is this more recent (rather than the earlier) proposed period of time which is now the focus of plaintiff's complaint. Its reply brief underscores (at page 5) its contention that

> all of the evidence in the record supports the conclusion that Japanese nylon impression fabric was sold at LTFV by the end of 1985. Not even a scintilla of evidence in the record has been identified either by the ITA or Asahi to support the ITA's refusal to investigate beyond June 1985.

In response to this contention, the defendant relies initially on the language of 19 U.S.C. § 1673(1), pursuant to which an antidumping duty can be imposed if "foreign merchandise is being, or is likely to be, sold in the United States at less than fair value." The significance of the disjunctive, in the view of the defendant, is stated to be as follows:

> * * * [T]he statute speaks in the alternative, *i.e.*, Commerce may determine that sales at LTFV have occurred, or it may determine that such sales are likely to occur. There is no requirement that it do both. Under prevailing practice in LTFV investigations, Commerce examines the likelihood of sales at LTFV only where no sales have been made or reported during the period of investigation.[7]

Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Here, the context is foreign merchandise sold in the United States at less than fair value. The above auxiliary verbs connected by "or" simply set the tenses, not the substance, of the statute. And even if the act were drawn to differentiate in a substantive way one time

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[7]Defendant's Memorandum, p. 13. In response to the petitioners' comment (22) that the ITA should expand the period of investigation to determine the likelihood of sales at less than fair value, the agency itself took the position, in part:

> * * * During the past investigation on nylon impression fabric from Japan, the respondents Asahi and Shirasaki were specifically excluded because their margins were *de minimis* or minimal. Thus, the evidence is contrary to petitioners' allegation of a likelihood of sales at less than fair value. 51 Fed. Reg. at 15,818.

from the other[8], the antidumping law is remedial, not punitive[9], and remedial statutes are to be construed liberally. *See, e.g.*, 3 Sutherland Stat. Const. § 60.01 (4th rev. ed. 1986) and cases cited therein. In short, the foregoing view of the defendant is too restrictive a reading of the law it is obligated to enforce.[10] While the ITA has broad discretion in enforcement of that law, and its expertise is entitled to deference, it is not at liberty to disregard the statute's plain meaning. *Washington Red Raspberry Commission* v. *United States*, 11 CIT ——, ——, 657 F. Supp. 537, 541 (1987) (citing *Al Tech Specialty Steel Corp.* v. *United States*, 10 CIT 743, 745–46, 651 F. Supp. 1421, 1424–25 (1986)), *aff'd*, 859 F.2d 898 (Fed. Cir. 1988).

The issue is thus whether defendant's restrictive reading requires remand for reconsideration. On the record at hand, the court concludes that it does not. *Toho Titanium Company, Ltd.* v. *United States*, 11 CIT ——, ——, 657 F. Supp. 1280, 1285 (1987), held that, in

> evaluating Commerce's practice pursuant to [19 C.F.R. § 353.38(a)], the Court must look at each case independently to assess whether the evidence produced during the investigation provides substantial evidence on the record to support the determinations required by statute

and also that choice of a six-month period for investigation "does not mean that data [there] from * * * is insubstantial evidence on the record to support Commerce's determinations." 11 CIT at ——, 657 F. Supp. at 1284. Indeed, here the plaintiff virtually concedes that substantial evidence exists, indicating the absence of sales at less than fair value for the period investigated and of the likelihood of such sales based thereon[11], hence the plea below (and now) that other periods be considered by the ITA. The agency could have done so, but its decision not to follow-up the petitioners' leads was in accordance with the law. *See* 19 C.F.R. § 353.38(a); *Toho Titanium Company, Ltd.* v. *United States*, 11 CIT at ——, 657 F. Supp. at 1285 (the regulation "gives the Secretary discretion to collect sales and cost information for a longer or shorter period of time as he deems necessary").

While the record reveals considerable independent effort on the part of the petitioners to provide information about the domestic and foreign marketplaces, both before and after commencement of the administrative proceedings, the timing thereof rested, of course, with them. That their choice of moment did not lead to desired determination(s) of dumping is not now a basis for judicial extension of the governing law as to investigation time-frame. Indeed, the

[8] *Cf. e.g.*, H. Weihofen, Legal Writing Style, pp. 95–96 (2nd ed. 1980) ("Distinguish Between the Conjunctive and the Disjunctive").

[9] *Badger-Powhatan, A Div. of Figgie Int'l, Inc.* v. *United States*, 9 CIT 213, 216, 608 F. Supp. 653, 656 (1985).

[10] *Cf.* Intervenor Asahi Chemical Industry Co., Ltd.'s Brief in Opposition to Plaintiff Bomont Industries' Motion for Judgment on the Agency Record ("Asahi Brief"), p. 11 ("Th[e] language [of the statute] obviously contemplates findings about either actual pricing behavior, or projected pricing behavior, based on information derived from the specified period of investigation").

[11] *See generally* Plaintiff's Reply Brief, pp.1–15.

plaintiff does not cite a case requiring such a result[12], nor has this court discovered any. This is not to imply, however, that administrative extension of the period of investigation would have been inappropriate, in the light of the information brought to the ITA's attention and the letter and the spirit of the antidumping law, only that the petitioners were afforded that degree of due process minimally required in consonance with the rights affected and type of proceeding involved.

II

Part II of the petition set forth at length "information concerning nylon impression fabric produced by or for Asahi or sold by Shirasaki transshipped through Canada and West Germany to the United States". R. Doc 1 at 49, para. 1. *See generally id.*, pp. 49–85. In the notice of initiation of its investigation, the ITA referred specifically to the allegations of transshipment in finding that the petition met the requirements of 19 U.S.C. § 1673a. *See* 50 Fed. Reg. at 28,112. Apparently, during the course of the ensuing proceedings, the petitioners pressed the ITA to investigate the alleged transshipments for sales at less than fair value. The agency's stated, final position on this point is as follows:

> We disagree. Counsel for petitioners did not provide substantiation of any kind that imports of linked nylon impression fabric from West Germany originated in Japan. To the contrary, we verified that Shirasaki did not export any of this product to West Germany. Asahi, in its response, provided affidavits from the West German importer and its purchasers, two companies which ink and distribute the Asahi merchandise, that the Japanese fabric is inked and resold to the ultimate user in Europe. Further, this investigation, as requested in the petition, covers only uninked nylon impression fabric. There were no imports of this product from West Germany during the period of investigation. 51 Fed. Reg. at 15,819.

Counsel for the defendant now admit that the foregoing assertion of no imports of this product from West Germany during the period of investigation was in error, but the argue that

> it is clear from the record that the agency meant to say that there were no *transshipped* imports of uninked impression fabric from West Germany.[13]

The intervenor-defendant argues that the ITA Report of Investigation of Asahi in Osaka, Japan

> clearly indicates at page 5 that the Department verified reported sales to West Germany during the period of investigation as set forth in Asahi's questionnaire answer. The fact that the ver-

[12]The plaintiff does attempt to rely on *Freeport Minerals Company* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985). However, that case focused on an ITA determination to revoke an outstanding antidumping-duty order based on data years out of date at the time of the determination. In such a circumstance, the court of appeals held the ITA had abused its discretion by neglecting to review current data. The situation is hardly comparable in this action. *Cf. PPG Industries, Inc.* v. *United States*, 12 CIT ——, 702 F. Supp. 914 (1988).

[13]Defendant's Memorandum, p. 35 (emphasis in original).

> ification report did not refer specifically to "transshipments" does not indicate that the Department failed to verify Asahi's sales to third country markets.[14]

But the affidavits provided by Asahi[15] and apparently relied on by the ITA do not prove the contrary either; they do not add up to the verification contemplated by the statute. At the time of the proceedings below, 19 U.S.C. § 1677e(a) required the ITA to "verify all information relied upon in making (1) a final determination in an investigation".[16] That is, the obligation to verify rests with the administering authority, and not with the private parties before it. Any implication that the petitioners had the burden of substantiation is off the mark once, as here, the ITA had found the information presented in the petition adequate grounds for investigation. As stated in *The Budd Company* v. *United States*, 1 CIT 67, 72, 507 F. Supp. 997, 1001 (1980), the provisions of the Trade Agreements Act of 1979 clearly express congressional intent that the administrative agency will obtain information through its own investigative efforts. *Cf. Freeport Minerals Company* v. *United States*, 776 F.2d at 1033.

To the extent counsel are now attempting to justify the ITA's failure to verify on its own the allegations of transshipment, this court cannot accept such *post hoc* rationalization for the absence of required agency action. *See, e.g., Federal Power Commission* v. *Texaco*, 417 U.S. 380, 397 (1974). Rather, the issue must be remanded for direct verification by the ITA, one way or the other.

III

The record reveals that Asahi and a company by the name of Seiren were related parties within the meaning of 19 U.S.C. § 1677b(e)(3)(E) (1984) in view of the former's holding more than five percent of the stock of the latter. The record also shows that Asahi delivered its nylon fabric unslit to Seiren for finishing, which consisted of scouring and heat-setting. Upon completion of that process, Asahi sold the merchandise to independent trading companies. When destined for the United States, the finished goods were delivered to the trading companies directly from Seiren, which slit the fabric for them.

> The ITA's final determination states that the Department conducted an extensive verification of Asahi and its sales practices. We verified from Asahi's books and records that Asahi sells only unslit material and only to the trading companies. We found that Seiren was recovering its costs in its finishing operations for Asahi. Furthermore, since Asahi accounts for only a very small fraction of Seiren's business, we found no rela-

[14] Asahi Brief, p. 37.

[15] *See* Confidential Document ("ConfDoc") 5, Annex 5.

[16] This requirement has been relettered subsection (b) per Pub. L. 100-418, § 1331, 102 Stat. 1204, 1207 (1988).

tionship between Seiren's losses and prices charged to Asahi for finishing the fabric. 51 Fed. Reg. at 15,817.

The plaintiff claims the agency "failed 'to collect pertinent data or to consider * * *' whether the price between Asahi and the unrelated trading company was a fictitious price designed to avoid the antidumping duty law." Plaintiff's Reply Brief, p. 47. Or, stated another way:

> * * * Because the "unrelated" trading companies were dealing on the one hand with Asahi and on the other hand with Seiren (related parties), Bomont's repeated concern was that a "fictitious" sale has been inserted in the middle of an otherwise straightforward related-party transaction solely to avoid the dumping law. *Id.* at 48.

After review of the record, including ConfDoc 19 and attachments, the court concludes that it contains sufficient, substantial evidence to allay the stated concern that sales between Asahi and the trading companies were fictitious and aimed at undermining U.S. antidumping law. That law provides that, whenever the administering authority has "reasonable grounds" to suspect sales at prices which represent less than the cost of production, it shall investigate further and shall disregard them if the suspicion is substantiated. 19 U.S.C. § 1677b(b). This court is unable to find fault with the ITA's failure to equate the Asahi dealings with, and relationship to, Seiren reflected in the record with such requisite "reasonable grounds". That is, plaintiff's position that the agency should have gone further in investigating Asahi is not compelling.[17] On the other hand, if sales below the cost of production had been uncovered (over an extended period of time and in substantial quantities, thereby invoking constructed value per 19 U.S.C. § 1677b(b) and (e)), the ITA would have had discretion not to disregard the transactions involving Seiren under subsection (e)(2) of section 1677b. The fact that parties are related is not ground to disregard automatically transactions between them.

IV

In regard to Shirasaki, the plaintiff complains that the ITA erroneously relied on product-specific general, selling, and administrative expenses rather than such expenses for the entire company in determining foreign market value. In its final determination, the agency had stated that it did not "believe the company-wide GS&A percentage is appropriate for NIF sold to unrelated home market customers." 51 Fed. Reg. at 15,818.

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[17] Plaintiff's two specific claims are that the ITA failed to verify (1) that the "Asahi-to trading company-to-Seiren transaction was not fictitious" [Plaintiff's Reply Brief, p. 48 (emphasis deleted)] and (2) that "Seiren was recovering its costs in its finishing operations for Asahi." *Id.* at 50 (emphasis deleted). As to the first contention, the record amply supports the thesis that the only sales involved were to the unrelated trading companies, and not to Seiren. As for the second, information in the record indicates that the amount paid by Asahi to Seiren for packing and transportation that the amount paid by Asahi to Seiren for packing and transportation of the merchandise, for example, exceeded the latter's cost therefor. *Compare* ConfDoc 19 at 7 with *id.* at 8. Moreover, while Seiren reported an overall net loss, the record does not indicate other costs incurred by Seiren at Asahi's behest contributed in any material way thereto.

The disagreement revolves around the fact that company-wide expenses were found to be "significantly higher"[18] than those attributed to the nylon impression fabric sold in the home market and also around the existence of agency precedent relying on total company GS&A expenses. However, not even the plaintiff argues that the controlling statute requires the ITA to follow such an approach in every case, only that not to do so is "inherently suspect". Plaintiff's Brief, p. 116.

Be that view as it may, the record supports the approach of the agency herein. It shows that most Shirasaki sales were for export, that those sales entailed the existence of a branch office, and that the expenses of that office were documented separately in the company's books. Hence, it was possible and appropriate to segregate those unrelated expenses from home-market-sale general expenses.

Some of Shirasaki's product during the period of investigation was characterized as "computer trim" or "second quality". The petitioners below argued that

> the proper method for accounting for sales of waste or second quality products is to deduct the sales revenue of a by-product from the total cost of producing all products and determine the cost of production of the primary products by dividing the remaining production costs by only the net yield of the primary product.[19]

Notwithstanding claims that the ITA had followed this approach in other proceedings, the agency declined to do so in the matter now at bar, stating:

> Shirasaki did not produce by-products. Additionally, its method of accounting for second quality product was used for the final determination because it adequately accounts for the cost of such products. 51 Fed. Reg. at 15,818.

This position has sufficient support in the record. To begin with, the second quality product was sold to the U.S. market, albeit for different application, but still within the realm of nylon impression fabric. Secondly, Shirasaki apparently discounted the production yields for the lesser product by an amount equal to its sales discount in determining cost of production. *See* R. Doc 163 at 25–26.[20] While this approach does not appear to have been verified, as the plaintiff points out, the court concludes that any resultant error was harmless since the third, and most compelling, fact in the re-

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[18] R. Doc 97 at 1 (001953).

[19] Plaintiff's Brief, pp. 117–18, citing A. Matz & M. Usry, Cost Accounting Planning and Control (6th ed. 1976); F. Kollaritsch, Cost Systems for Planning, Decisions, and Controls Concepts and Techniques (1979); G. Crowingshield & K. Gorman, Cost Accounting (3d ed. 1974); J. Dearden, Cost Accounting and Financial Control Systems (1973).

[20] *See also Ipsco, Inc.* v. *United States*, 13 CIT ——, Slip Op. 89–66 (May 18, 1989), citing with approval (at p. 8) C. Horngren, Cost Accounting: A Managerial emphasis (5th ed. 1982) to the effect that "there are a number of methods for allocating costs between joint products, the most common of which 'allocate in proportion to some measure of the relative revenue-generating power identifiable with the individual products'" and also citing *Chemical Products Corp.* v. *United States*, 10 CIT 626, 645 F. Supp. 289, *remand order vacated*, 10 CIT 819, 651 F. Supp. 1449 (1986), to the effect that the "ITA's failure to take into account the disparate values of two products yielded by the same production process when allocating factors of production between them" was "unreasonable and not in accordance with law". *Id.* at 10.

cord is that the computer trim sales were "insignificant" during the period of investigation. ConfDocs 16 and 28 at 6. Thus, this court is not convinced that application of plaintiff's preferred methodology, quoted above, would lead to a material difference in the final determination.

Finally, the plaintiff contends that Shirasaki's cost-of-production information contained inconsistencies that were not examined or verified by the ITA. Suffice it to state that the court has reviewed the entire report in the record of the verification of Shirasaki's cost of production (ConfDoc 28) and concludes that it fulfills the expectations of the controlling statute.

V

In its concluding point, the plaintiff states that it is "strongly opposed to unprincipled agency action, ignoring the statute, and adopting uncritically the claims of respondents." Plaintiff's Reply Brief, p. 60. Attention is directed at 19 U.S.C. § 1677f(b)(1)(A) (1984), which provided that the ITA require that information for which confidential treatment is requested be accompanied by either

> (i) a nonconfidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or
>
> (ii) a statement that the information is not susceptible to summary accompanied by a statement of the reasons in support of the contention.

When the petitioners complained below that the foregoing provisions had not been adhered to adequately, the ITA agreed, in part, stating that the nonconfidential questionnaire responses, "as submitted, do not comply with the nonconfidential summary provisions of the Tariff Act of 1930, as amended by the Tariff and Trade Act of 1984." R. Doc 54, p. 1. The agency went on to report, however, that acceptable explanations for the noncompliance had been received from the respondents. And it abides by this report and analysis now. *See* Defendant's Memorandum, p. 54.

Whatever the merits of the varying viewpoints at that moment in the administrative proceedings, the court cannot conclude now that those proceedings amounted, in the end, to denial of that degree of due process minimally required.

VI

While plaintiff's thorough presentation in support of its motion for judgment on the agency record has exposed less-than-perfect proceedings below, with the exception discussed in Point II above, they were in accordance with law and supported by substantial evidence. On the motion, remand for further administrative action is required only in regard to the alleged transshipments discussed in that Point. The ITA may have 45 days from now for further proceedings not inconsistent with that discussion and to file any deter-

mination of the issue. The plaintiff may have 15 days thereafter in which to respond, and the defendant and the intervenor-defendant may have ten days to reply thereto. Otherwise, plaintiff's motion for judgment on the agency record must be, and it hereby is, denied.

(Slip Op. 89–95)

PHILIP MORRIS U.S.A., A DIVISION OF PHILIP MORRIS INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–02–00070

When Customs reliquidates merchandise beyond the statutory period allowed for reliquidation, an importer must file a protest in order to challenge the unlawful reliquidation. Under 19 U.S.C. § 1514(c)(2)(A), an importer must file a protest challenging reliquidation even if the protest is essentially identical to a prior protest against liquidation.

[Motion to dismiss granted.]

(Decided July 6, 1989)

Arnold & Porter (Patrick F.J. Macrory and *Michael T. Shor)* for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*John J. Mahon*) for defendant.

DICARLO, *Judge:* Philip Morris U.S.A. (importer) challenges the denial of its protest against classification of five entries of tobacco, which the United States Customs Service reliquidated after filing of the protest. The government moves pursuant to Rule 12(b) of the Rules of this Court to dismiss the importer's action for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

The Court finds that the importer was required to file a timely protest against an entry which Custoims reliquidated after the statutory time for reliquidation had expired. The Court also finds that 19 U.S.C. § 1514(c)(2)(A) requires an importer to file a protest challenging reliquidation even if the protest is essentially identical to a prior protest against liquidation. As the importer failed to file a timely protest against reliquidation, the Court grants the government's motion to dismiss.

BACKGROUND

The importer entered its merchandise as "scrap tobacco" under item 170.60 of the Tariff Schedules of the United States (TSUS). Customs sent the importer a "preliquidation notice" stating that Customs intended to liquidate the tobacco under item 170.35, TSUS (stemmed leaf). Despite the preliquidation notice, Customs subsequently liquidated the tobacco as entered under item 170.60, TSUS.

The importer filed a protest claiming the tobacco was classifiable under item 170.28, TSUS (Oriental leaf, not stemmed), or item 170.60, TSUS, under which the tobacco had been liquidated. Customs then reliquidated five entries under item 170.35, TSUS, the classification stated in the preliquidation notice. One of these reliquidations occurred after the 90 day limit under 19 U.S.C. § 1501 (1982).

The importer did not file another protest after the reliquidations under item 170.35, TSUS. Customs subsequently denied the protest because the "[c]lassification is correct under [item] 170.35, according to file information, reports and [an] import specialist[']s observation of [the] process."

Discussion

The government argues that the Court lacks subject matter jurisdiction because no protest was filed after reliquidation of importer's merchandise and the reliquidations become final and conclusive upon all persons. Once the jurisdiction of the court is challenged, the burden is on the plaintiff to prove that jurisdiction is proper. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Dennison Mfg. Co.* v. *United States*, 12 CIT ——, 678 F. Supp. 894, 896 (1988); *Lowa Ltd.* v. *United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983, *aff'd*, 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984). Moreover, waivers of sovereign immunity are to be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Boe*, 64 CCPA 11, 15, C.A.D. 1177, 543 F.2d 151, 154 (1976).

The importer alleges jurisdiction under 28 U.S.C. § 1581(a) (1982), which provides for exclusive jurisdiction in the Court of International Trade over any civil action commenced to contest the denial of a protest under 19 U.S.C. § 1515(a) (1982). *See Traveller Trading Co., Inc.* v. *United States*, 11 CIT ——, Slip Op. 87–143, at 3 (Dec. 30, 1987). To contest the tariff classification of merchandise, a protest must be filed with Customs within ninety days after, but not before, notice of liquidation or reliquidation. 19 U.S.C. § 1514(c)(2)(A) (1982). *See also* 19 C.F.R. § 174.12 (1988). If no timely protest is filed, the liquidation or reliquidation becomes final and conclusive against all parties under 19 U.S.C. § 1514(a) (1982).

A. *Entry Reliquidated Beyond the 90-Day Period*

The importer argues that reliquidation of entry no. 86–411207–9 is void because Customs reliquidated the entry more than 90 days after the notice of liquidation in contravention of the time limit in 19 U.S.C. § 1501 (1982). The government counters that even an unlawful reliquidation must be the subject of a timely protest in order for the Court of International Trade to exercise jurisdiction under 28 U.S.C. § 1581(a) (1982).

Customs may reliquidate imported merchandise even after an importer files a protest:

> A liquidation made in accordance with section 1500 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the appropriate customs officer on his own initiative, notwithstanding the filing of a protest *within ninety days* from the date on which notice of the original liquidation is given to the importer * * *.

19 U.S.C. § 1501 (1982) (emphasis added).

An unlawful reliquidation by Customs is not void, but rather is merely voidable. *Omni U.S.A., Inc.* v. *United States,* 840 F.2d 912, 915 (Fed. Cir.), *cert. denied,* 109 S. Ct. 56 (1988); *United States* v. *A.N. Deringer, Inc.*, 66 CCPA 50, 55, C.A.D. 1220, 593 F.2d 1015, 1020 (1979); *Computime Inc.* v. *United States*, 9 CIT 553, 556–57, 622 F. Supp. 1083, 1086 (1985). Neither the legality nor correctness of a reliquidation by Customs may be disturbed unless a timely protest is filed according to the procedures in 19 U.S.C. § 1514 (1982 & Supp. V 1987), and failure to do so within the stated period leaves the reliquidation final. *See United States* v. *Utex Int'l Inc.*, 857 F.2d 1408 (Fed. Cir. 1988); *Omni U.S.A., Inc.* v. *United States*, 840 F.2d 912 (Fed. Cir.), *cert. denied,* 109 S. Ct. 56 (1988). As the importer filed no timely protest against this untimely reliquidation, the Court is without jurisdiction under 28 U.S.C. § 1581(a) (1982) as to this entry.

B. *Timely Reliquidations*

As to the remaining entries, the government argues that the protest did not contest a decision of Customs as to classification and rate of duty because reliquidation was the "final action" of Customs. The government claims the importer was required to file a second protest after reliquidation. The government relies upon *United States* v. *Parkhurst & Co.*, 12 Ct. Cust. App. 370, 372–73, T.D. 40,522 (1924), where the court stated:

> Whether the collector reliquidates because of a protest of the importer or on order of the Secretary of the Treasury or because he believes the original liquidation to be incorrect, the reliquidation vacates and is substituted for the collector's original liquidation. The reliquidation, not the original liquidation, is the final decision of the collector as to the rate and amount of duty to be paid by the importer, and the time to protest begins to run from the date of the latest liquidation.

See also Robertson v. *Downing,* 127 U.S. 607, 613 (1888) (the time to protest begins to run when the entries have been finally liquidated, and not from a previous liquidation which has been abandoned).

The government states that although the law in *Parkhurst* was modified by enactment of 19 U.S.C. § 1514(d) in that only matters which were involved in the reliquidation could be the subject of a protest against reliquidation, the reliquidations in this case changed the classifications of the merchandise and therefore had to be the

subject of a timely protest after the reliquidations if they were to be challenged. *Defendant's Motion to Dismiss*, at 7.

The importer counters that, once having validly contested the classification of merchandise after liquidation, it is not required and indeed was prohibited from filing a second protest under 19 U.S.C. § 1514(c)(1) (1982), which states that "[o]nly one protest may be filed for each entry of merchandise* * *." The importer also argues that under 19 U.S.C. § 1514(d) (1982) it would have been prohibited from raising claims in a protest against reliquidation that had already been raised in a protest against liquidation. 19 U.S.C. § 1514(d) (1982) provides that reliquidation "shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation." 19 U.S.C. § 1514(d) (1982).

19 U.S.C. § 1514(c)(2)(A) (1982) requires that a protest be filed "within ninety days after but not before * * * notice of liquidation or reliquidation." Since reliquidation is the final protestable action by Customs, 19 U.S.C. § 1514(c)(2)(A) generally requires an importer to file a protest against reliquidation in order to seek judicial review of the reliquidation. Use of the disjunctive "or" in this provision does not allow the importer to choose whether or not to protest a reliquidation once it has validly protested liquidation of the same entry. This provision merely recognizes that protests are possible and/or necessary depending upon the circumstances of each case.

Use of the disjunctive in 19 U.S.C. § 1514(c)(2)(A) also does not permit Customs to confer jurisdiction on this Court by treating the importer's protest against liquidation as a protest against reliquidation. Customs has no authority to waive a jurisdictional requirement imposed by statute. *See Shigoto Int'l Corp.* v. *United States*, 66 Cust. Ct. 252, 253, C.D. 4199 (1971) (Customs' denial of a protest filed by an improper party did not confer jurisdiction).

The importer cites *Webcor Elec.* v. *United States*, 79 Cust. Ct. 137, C.D. 4725 (1977), in support of its contention that the one protest rule in 19 U.S.C. § 1514(c)(1) prohibits the filing of a protest against reliquidation which is identical to the protest filed against a prior liquidation. In *Webcor*, the importer filed two protests on the same entry, one challenging a surcharge applied to the merchandise, and the second challenging Customs' classification of the same merchandise. The court held that under 19 U.S.C. § 1514(c)(1), the importer could file only one protest on the same category and entry of merchandise. *Webcor* did not involve a reliquidation after the filing of a protest. While 19 U.S.C. § 1514(c)(1) prohibits the filing of multiple protests on the same entry after liquidation or reliquidation, the rule does not preclude the importer from protesting a reliquidation when it has already filed a valid protest following liquidation.

The importer also argues that *Computime, Inc.* v. *United States*, 8 CIT 259, 601 F. Supp. 1029 (1984), *aff'd*, 3 Fed. Cir. (T) 175, 772 F.2d 874 (1985), *Audiovox Corp.* v. *United States*, 8 CIT 233, 598 F. Supp.

387 (1984), *aff'd*, 3 Fed. Cir. (T) 168, 764 F.2d 848 (1985), and *Ataka Am., Inc.* v. *United States*, 79 Cust. Ct. 135, C.D. 4724 (1977), support its argument that 19 U.S.C. § 1514(d) prohibited it from filing a protest against reliquidation which would have been identical to its protest against liquidation.

Computime, *Audiovox*, and *Ataka* are inapplicable to the facts of this case. Those three cases involved different categories of issues, each of which the court in those cases held could not be asserted for the first time at reliquidation. In *Computime*, the importer protested Customs' classification of watch modules, but, added a protest against Customs' classification of watchbands following reliquidation. The court held that the importer could not challenge the classification of a separate category of merchandise for the first time at reliquidation which it could have raised in its protest against the initial liquidation.

Similarly, in *Audiovox*, the importer protested Customs' classification of its merchandise following liquidation, but raised the separate issue of duty free treatment under the Generalized System of Preferences for the first time in its protest against reliquidation. The court held that 19 U.S.C. § 1514(d) precluded the importer from raising a new issue that could have been raised in its initial protest against liquidation.

Finally, in *Ataka*, the importer protested Customs' classification of its merchandise following liquidation, and only raised the separate issue of a supplemental duty imposed pursuant to a presidential proclamation following reliquidation. As in *Audiovox*, the *Ataka* court held that the importer could not raise for the first time a separate issue in its protest following reliquidation which it could have raised in its initial protest against liquidation.

In this action, the issue of classification is the same, and the importer would not be raising an issue other than classification had it protested the reliquidation of the entries. Moreover, this action involves the same category of merchandise, i.e. tobacco. Thus, the filing of a subsequent protest following reliquidation would not have reopened the disputed entries to any questions not involved in the reliquidation. *See* 19 U.S.C. § 1514(d) (1982).

While the Court recognizes that the facts of this case are highly unusual, the Court holds that the importer was required to protest within 90 days of Customs' reliquidation under item 170.35, TSUS, even if the substance of that protest would be essentially identical to its protest against liquidation.

Conclusion

The Court finds that the importer was required to file a timely protest against an entry which Customs reliquidated after the statutory time for reliquidation had expired. The Court also finds that 19 U.S.C. § 1514(c)(2)(A) requires an importer to file a protest challenging reliquidation even if the substance of the protest is essen-

tially identical to a prior protest against liquidation. As the importer failed to file a timely protest against reliquidation, the Court grants the government's motion to dismiss for lack of jurisdiction.

ABSTRACTED CLASSIFICATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Ite
C89/128	Re, C.J. June 29, 1989	Ferndale Grain Co.	87-1-00094	Item 127.10 1.5¢ per lb.	Item 3%
C89/129	Re, C.J. June 29, 1989	Sterncomco, Inc.	87-1-00098	Item 127.10 1.5¢ per lb.	Item 3%
C89/130	DiCarlo, J. June 30, 1989	Starlight Trading, Inc.	85-2-00281	Item 380.04 or 382.81 Various rates	Item Va
C89/131	DiCarlo, J. June 30, 1989	Starlight Trading, Inc.	87-8-00893	Item 380.04 or 382.81 Various rates	Item Va

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HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
em No. and rate		
n 184.85 %	Agreed statement of facts	Blaine Triticale
n 184.85 %	Agreed statement of facts	Blaine Triticale
n 376.56 arious rates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971); Izod Outerwear v. U.S., 9 CIT 309 (1985); H. Rosenthal v. U.S., 609 F.2d 999 (1979) and Pacific Trail Sportswear v. U.S., S.O. 88-28 (1988)	New York Men's, women's, children's and infants, jackets, etc.
n 376.56 arious rates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971); Izod Outerwear v. U.S., 9 CIT 309 (1985); H. Rosenthal v. U.S., 609 F.2d 999 (1979) and Pacific Trail Sportswear v. U.S., S.O. 88-28 (1988)	New York Men's, women's, children's and infants, jackets, etc.

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